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Relevant Docket Entries

DISTRICT COURT, ADA COUNTY, IDAHO

May 9, 1968 Notice of Appeal from Probate Court

Dec. 2, 1968 Memorandum Decision and Order

Feb. 11, 1970 Copy of Supreme Court Opinion reversing
Order and Judgment

SUPREME COURT OF THE STATE OF IDAHO

Feb. 11, 1970 Filed Opinion

Mar. 24, 1970 Entered Order denying respondent's petition for rehearing

Mar. 24, 1970 Entered judgment

June 16, 1970 Filed respondent's Notice of Appeal to
U.S. Supreme Court

Petition of Sally Reed for Letters of Administration

IN THE PROBATE COURT OF THE COUNTY OF ADA STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF RICHARD LYNN REED, Deceased.

The petition of Sally Reed respectfully represents and shows unto the Court:

I.

Richard Lynn Reed, the above named decedent, died intestate at Boise, in the County of Ada, State of Idaho, on the 29th day of March, 1967, and that time was a resident of Boise, in the County of Ada, State of Idaho.

II.

The said decedent left an estate in said County of Ada, State of Idaho, consisting of personal property.

III.

The value and character of the property of the estate so left by said decedent, so far as the same are known to your petitioner or can be by her ascertained, are as follows:

- Educational savings fund in Idahy (sic) Federal Credit Union, value \$495.00, plus interest.

Clarinet, value approximately \$100.00 Personal clothing and effects, value approximately \$50.00, Records, value approximately \$100.00

IV.

The estate and effects for which letters of administration are hereby applied do not exceed in value the sum of \$1000.00.

V.

The only heirs at law of said decedent known to your petitioner are as follows, to-wit:

NAME	AGE	RELATIONSHIP	RESIDENCE
Cecil R. Reed	over 21	Adopted Father	5207 Ponder
Sally Reed	over 21	Adopted Mother and Legal Guardian	1622 Vista Avenue Boise, Idaho

VI.

That due search and inquiry have been made to ascertain whether or not the decedent left a will. That no will has been Found and according to the best knowledge of your petitioner said decedent left no will or testament.

VII.

That your petitioner is over the age of majority, a citizen of the United States of America and a resident of the County of Ada, State of Idaho; that your petitioner is a person interested in said estate, the mother and legal guardian of the person and estate of Richard Lynn Reed, and a person in all respects competent to act as administratrix of the estate, and is entitled to letters of administration upon said estate.

WHEREFORE, Your petitioner prays that a day may be appointed for hearing this petitioner's petition and that due notice of said hearing be given as required by law; that upon hearing and the proofs to be adduced thereat, the administration of said estate be granted to your petitioner and letters of administration thereupon be issued to her.

ROBERT F. McLAUGHLIN

Attorney for the Petitioner

Residence and Post Office Address
Mountain Home, Idaho

(Jurat omitted in printing)

Petition of Cecil R. Reed for Letters of Administration

IN THE
PROBATE COURT
OF ADA COUNTY
STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF
RICHARD LYNN REED, Deceased.

To the Honorable W. E. Smith, Judge of the Probate Court of the County of Ada, State of Idaho:

The Petition of Cecil R. Reed, of said Ada County, Respectfully shows:

That Richard Lynn Reed died on or about the 29th day of March, 1967, County of Ada, State of Idaho.

That said deceased, at the time of his death, was resident of the County of Ada, State of Idaho.

That said deceased left estate in the said County of Ada, State of Idaho, consisting of personal property, the same being his separate property and not to exceed \$1,000.00 in value.

That the names, ages, and residences of the heirs of said deceased are as follows:

Cecil R. Reed, father adult
5705 Plnder Ave. Boise, Idaho
Sally Reed, mother adult
1622 Vista Ave. Boise, Idaho

That due search and inquiry have been made to ascertain if said deceased left any will and testament but none has been found and according to the best knowledge, information and belief of your petitioner, said deceased died intestate;

That your petitioner, Cecil R. Reed, is the father of said deceased, and therefore as your petitioner is advised and believes he is entitled to letters of administration of said estate.

WHEREFORE, Your petitioner prays that a day of Court may be appointed for hearing this application; that due notice thereof be given by the Clerk of said Court, by posting notices according to law; and upon said hearing, and the proofs to be adduced, letters of administration of said estate may be issued to your petitioner.

Dated: November 27, 1967.

CECIL R. REED
Applicant

CHARLES S. STOUT
Attorney for applicant
Residing at Boise, Idaho

Filed Nov. 27, 1967

Opinion of Probate Judge

PROBATE COURT

COUNTY OF CANYON, STATE OF IDAHO

CALDWELL, IDAHO

March 6, 1968

Mr. Charles S. Stout
Idaho Building
Boise, Idaho

Re: Estate of Richard Lynn Reed, Deceased.

Dear Sir:

The Application of Sally Reed, mother of the decedent and the application of Cecil R. Reed, father of the decedent, for Letters of Administration were heard jointly on February 21, 1968, and the Court took the same under advisement.

Under 15-312, Idaho Code, the mother and father would have equal priority to Letters of Administration. However, Section 15-314, Idaho Code, reads as follows:

"Preferences,—Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood."

The Court believes proper interpretation of the statutes requires the granting of Letters of Administration to Cecil R. Reed.

It did not appear that either party is disqualified to act as administrator.

The interests of Sally Reed can be protected by requesting notice of proceedings, objections to the inventory, by petition for distributive share, and by other procedural devices almost as fully as if she were appointed administratrix.

Will counsel for Cecil R. Reed please prepare an Order Appointing Administrator fixing bond at \$1,000.00.

Very truly yours,

Floyd C. McClintick

Probate Judge

LCM:RR

cc: Robert F. McLaughlin

Ada County Probate Court

Order Appointing Administrator

IN THE
PROBATE COURT
OF ADA COUNTY, STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF
RICHARD LYNN REED,

Deceased.

The petitions of Sally Reed, the mother of deceased, and Cecil R. Reed, the father of deceased, praying for letters of administration of the estate of Richard Lynn Reed, deceased, coming on regularly to be heard the 21st day of February, 1968 and due proof having been made to the satisfaction of this Court that the Clerk had given notice in all respects according to law; and all and singular the law and the evidence by the Court understood and fully considered whereupon it is by the Court here adjudged and decreed that the said Richard Lynn Reed died on the 29th day of March, 1967, intestate, in the County of Ada, State of Idaho; a resident of said County of Ada, State of Idaho, at the time of his death; and that he left estate in the County of Ada, State of Idaho, and within the jurisdiction of this Court.

It further appearing to the Court that each of said applicants is qualified to act but that the said Cecil R. Reed has a preference by reason of Section 15-314 of the Idaho Code.

IT IS ORDERED, That letters of administration of the estate of the said Richard Lynn Reed, deceased, issue to the said petitioner, Cecil R. Reed, upon his taking the oath and filing a bond, according to law, in the sum of \$1,000.00.

Dated March 11, 1968.

FLOYD C. McCLINTICK
Probate Judge of Ada County Protem

Notice of Appeal Filed April 24, 1968

**IN THE
PROBATE COURT**

OF THE COUNTY OF ADA, STATE OF IDAHO

IN THE MATTER OF THE ESTATE OF

RICHARD LYNN REED,

Deceased.

To the Honorable W. E. Smith, Probate Judge of Ada County, and to the Honorable Lloyd C. McClintick, Probate Judge of Ada County, Protem:

COMES NOW Sally Reed, an heir-at-law of Richard Lynn Reed, deceased, and herewith gives notice of appeal from the verdict, judgment and order appointing administrator, and the whole thereof, rendered by the Court in this matter on the 11th day of March, 1968, denying the petition of Sally Reed for letters of administration of the estate of Richard Lynn Reed, deceased.

The grounds for said appeal are as follows:

1. The Court erred on both questions of law and of fact in not granting letters of administration of the estate of Richard Lynn Reed, deceased, to Sally Reed, an heir of the deceased.

Said heir and appellant appeals on questions of law and of fact therein and demands trial de novo in the District Court.

Dated this 23rd day of April, 1968.

ROBERT F. McLAUGHLIN

Attorney for Sally Reed

Residence and Post Office Address
Mountain Home, Idaho

Opinion of the District Court, Fourth Judicial District

IN THE
DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA
Civil No. 40834

MEMORANDUM DECISION AND ORDER

In the Matter of the Estate of
RICHARD LYNN REED, Deceased.

This matter is before the Court on appeal from the Probate Court of Ada County Idaho. The point in question is whether I.C. 15-314 is constitutional. This act provides that in the appointment of persons to administer an estate of a decedent, that of several persons claiming and equally entitled to administer that males must be preferred to females. The parties through their respective counsel have stipulated that the matter be submitted to the Court on briefs and the same have been submitted.

This section of the Probate Code originally appeared in the Probate Practice Act adopted by the first territorial legislature and has been in effect ever since. It was apparently borrowed from California. Montana has a similar statute. The constitutionality has never been questioned in any of these states. A companion statute, I.C. 15-312,

which gives a preference to brothers over sisters has been upheld in each of the states although the precise point which is involved in this case was not raised or argued.

The appellants contend that under the Idaho Civil Rights Act this section is unconstitutional. The Idaho Civil Rights Act, however, applies only to the right to obtain and hold employment and the right to an equal enjoyment of accommodation or public place of amusement, etc. The right to be appointed as administrator is not employment, it is merely a temporary appointment for a temporary purpose. For definition of the word administrator, see WORDS AND PHRASES, Volume Two, Page 291, Section 339. This Court, therefore, does not feel that this section is in conflict with the Civil Rights Law.

The appellant further contends that the statute is unconstitutional since it violates the Fourteenth Amendment to the Constitution of the United States and Article I, Section One of the Constitution of the State of Idaho. First it should be noted that women are not disqualified from being appointed to administer an estate in Idaho since Section 15-314 states that of several persons claiming and *equally* entitled to administer, males must be preferred to females. The Fourteenth Amendment protects all persons without regard to race, color or class and prohibits any state legislation which has the effect of denying to any race, class or individual the equal protection of the laws. The guiding principle of this guarantee of equal protection of the laws requires that all persons be treated alike under like circumstances and conditions both in the privileges conferred and the liabilities imposed. The equal protection clause of the Fourteenth Amendment is a restriction on state governments and includes all departments of state government including both political and judicial. It is true

that a state may classify persons and objects for the purpose of legislation and pass laws applicable only to persons or objects within a designated class. However, class legislation discriminating against some and favoring others is prohibited by the equal protection guarantee. One of the essential requirements as to classification so that it does not violate the constitutional guarantee as to equal protection of laws is that the classification must not be capricious or arbitrary but must be reasonable and natural and must have a rational basis. If it is arbitrary or capricious it is in conflict with the guarantee. The Court can see no reasonable basis for the classification which gives preference of males over females. Counsel for the respondent argues that there is a reasonable base for the classification. He says that men ordinarily have more business experience than women. The Court feels that this statement has no basis in fact in this modern age and society. There are occasions when a woman would be more qualified than a man and vice versa. This would be the basis of the Court choosing one over the other where they are both equally entitled to be appointed to administer the estate. Counsel for the respondent further claims that it would be easier to recover from a man than a woman in the case of defalcation. This again depends on the facts of whether or not the woman is married and whether or not she has separate property. Again these matters are something the Court should weigh in determining which of two persons is best qualified to administer the estate. The mere fact that a person is a male rather than a female is not a valid basis for preference and the Court, therefore, finds this section of the Idaho Code, 15-314, unconstitutional as a violation of the Fourteenth Amendment to the United

States Constitution and Article I, Section One of the Constitution of the State of Idaho.

Originally the appeal was from both questions of law and fact. The parties have stipulated that the appeal is only to questions of law. Therefore, the matter should be returned to the Probate Court for its determination of which of the two parties is best qualified to serve as administrator or administratrix of the estate. It is so Ordered.

Dated and signed this 2nd day of December, 1968.

CHARLES R. DONALDSON
District Judge

Notice of Appeal Filed January 30, 1969

IN THE
DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO

IN AND FOR THE COUNTY OF ADA

No. 30834

In the Matter of the Estate of

RICHARD LYNN REED,

Deceased:

To Sally Reed and to Derr, Derr and Walters and Robert F. McLaughlin, her attorneys, and to the above entitled Court:

You and each of you will please take notice that Cecil R. Reed, Administrator of the Estate of Richard Lynn Reed, deceased, does hereby appeal to the Supreme Court of the State of Idaho from that certain order and judgment made and entered in the above entitled cause by the above entitled court on the 2nd day of December, 1968, reversing and setting aside the order of the Probate Court of Ada County, Idaho, appointing said Cecil R. Reed, administrator of the estate of Richard Lynn Reed, deceased and ordering the said matter returned to said Probate Court for further proceedings and from the whole thereof.

Dated January 30, 1969.

CHARLES S. STOUT

Attorney for Appellant

Residing at Boise, Idaho

Opinion of the Supreme Court of the State of Idaho

IN THE
SUPREME COURT OF THE STATE OF IDAHO

No. 10417

Boise, November 1969 Term

Filed: Feb 11 1970

Martin V. Huff, Clerk

SALLY M. REED,

Plaintiff-Respondent;

v.

CECIL R. REED, ADMINISTRATOR In the Matter of the
Estate of Richard Lynn Reed, Deceased,

Defendant-Appellant.

Appeal from the District Court of the Fourth Judicial District, Ada County. Hon. Charles R. Donaldson, District Judge.

Appeal from order and judgment of district court reversing order of probate court appointing administrator. Order and judgment of district court *reversed*.

Charles S. Stout, Boise, for appellant.

Derr, Derr & Walters, Boise, and Robert F. McLaughlin, Mountain Home, for respondent.

McFADDEN, C.J.

Richard Lynn Reed, the adopted son of Sally M. Reed and Cecil R. Reed, died intestate on March 29, 1967, in Ada County. According to the respective petitions of his mother Sally M. Reed, and of his father, Cecil R. Reed, his parents were his only heirs at law.

Sally M. Reed, the respondent herein, as the decedent's mother, filed her petition for probate of his estate on November 6, 1967. Prior to the time set for the hearing on this petition, Cecil R. Reed, the father, also petitioned for letters of administration.

The Ada County probate judge deemed himself disqualified to act and the cause was heard before another probate judge, pursuant to stipulation. The cause was heard on the petitions for administration of the respective parties, and the probate court entered its order appointing appellant Reed (the father). The probate court in entering its order noted that each of the parties was equally entitled to letters of administration under I.C. § 15-312, but that Mr. Reed, the appellant, was entitled to a preference by reason of I.C. § 15-314, which provides that as between persons equally entitled to administer an estate, males must be preferred to females.

On April 23, 1968 the respondent (the mother) appealed to the district court contending that I.C. § 15-314 is unconstitutional as a violation of the Idaho Civil Rights Act (I.C. § 18-7301 et seq.), the Fourteenth Amendment of the United States Constitution and Art. 1, § 1 of the Idaho Constitution. The district court reversed the order of the probate court on the ground that I.C. § 15-314 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and returned the case to the

probate court for a determination, disregarding the preference set out by I.C. § 15-314, of who is entitled to the letters of administration. The appellant has appealed to this court contending that the district court erred in holding I.C. § 15-314 unconstitutional.

I.C. § 15-312 provides that

“Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother. * * *

This section is followed by I.C. § 15-314 which provides that

“Of several persons claiming and equally entitled to administer, males must be preferred to females; and relatives of the whole to those of the half blood.”

Since, then, under I.C. § 15-312 a father and mother are “equally entitled” to letters of administration, the father has a preference by virtue of I.C. § 15-314.

This court has said before that the priorities established by I.C. § 15-312 are mandatory, leaving no room for discretion by the court in the appointment of administrators. *Vaught v. Struble*, 63 Idaho 352, 120 P.2d 259 (1941). Similarly the preference given males by I.C. § 15-314 is also mandatory; the statute itself says that males *must* be preferred to females. Other courts construing similar

provisions have also held that the preference is mandatory. In *re Coan's Estate*, 64 P. 691 (Cal. 1901).

The respondent, however, contends that I.C. § 15-314 violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution because the discrimination against females as a class is not based upon any rational policy, but rather is arbitrary and capricious. She contends that there is no justifiable basis for granting males a preference merely on the basis of sex.

It is well settled that the equal protection clause of the Fourteenth Amendment does not preclude the legislature from making classifications and drawing distinctions between classes. It merely prohibits classifications which are arbitrary and capricious. *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956); *Morey v. Doud*, 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344 (1957); *McLaughlin v. Florida*, 379 U.S. 184, 13 L.Ed. 2d 222, 85 S.Ct. 283 (1964). It is for the courts to determine in each instance whether a particular classification rests upon rational grounds or is in fact without justification and arbitrary. *Carrington v. Rash*, 380 U.S. 89, 13 L.Ed. 2d 675, 85 S.Ct. 775 (1965); *McLaughlin v. Florida*, *supra*.

It is equally well settled that legislative enactments are entitled to a presumption of validity and that a classification will not be held unconstitutional absent a clear showing that it is arbitrary and without justification. *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950).

I.C. § 15-312 classifies individuals as to their relationship to a decedent and gives to those most closely related to the decedent a preference for appointment as administrator. This classification is basically in accord with the law as to the intestate succession of property in Idaho.

I.C. § 14-103. Those first entitled to succeed to the property have a priority over subsequent successors insofar as entitlement to administer is concerned. This is a basic and rational classification insofar as I.C. § 15-312 is concerned. However, unlike determination of succession of property where a court may award to individuals in a class a proportionate share of property without complication, the naming of an administrator out of a particular class becomes more involved. Generally only one administrator is named, although by joint petition it is possible for joint administrators to be named from a particular class.

When two or more persons of a class, as established by I.C. § 15-312, individually seek administration of an estate, the court is faced with the issue of which one should be named. By I.C. § 15-314, the legislature eliminated two areas of controversy, *i.e.*, if both a man and a woman of the same class seek letters of administration, the male would be entitled over the female, the same as a relative of the whole blood is entitled over a relative of the same class but of only the half blood. This provision of the statute is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits as to which of the two or more petitioning relatives should be appointed.

Philosophically it can be argued with some degree of logic that the provisions of I.C. § 15-314 do discriminate against women on the basis of sex. However nature itself has established the distinction and this statute is not designed to discriminate, but is only designed to alleviate the problem of holding hearings by the court to determine eligibility to administer. This is one of those areas where a choice must be made, and the legislature by enacting I.C. § 15-314 made the determination.

The legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women. As the United States Supreme Court pointed out in *Morey v. Doud*; *supra*,

“A classification having some reasonable basis does not offend against that clause [equal protection clause] merely because it is not made with mathematical nicety or because in practice it results in some inequality. * * * One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.’ *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369.” 77 S.Ct. at 1349.

While this classification may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary. We are concerned only with whether the classification is so irrational and arbitrary that it violates the constitution, and it is our opinion that it is not.

States have recognized the validity of classifications based upon sex in a variety of situations. See 2 *Stan. L. Rev.* 691. This court has held that a woman cannot bind her separate property by signing an appeal bond when it is not for her own use and benefit. See *Craig v. Lane*, 60 *Idaho* 178, 89 P.2d 1008 (1939). There are also several other cases from other jurisdictions upholding statutes discriminating on the basis of sex when there is a rational basis for distinguishing between the sexes. See *State v. Hunter*, 300 P.2d 455 (Ore. 1956); *Patterson v. City of Dallas*, 355 S.W.2d 838 (Tex. Civ. App. 1962); *State v.*

Hollman, 102 S.E.2d 873 (S.C. 1958); *Eskridge v. Division of Alcoholic Beverage Control*, 105 A.2d 6 (N.J. Super. 1954); *State v. Emery*, 31 S.E.2d 858 (N.C. 1944); *In re Mahaffay's Estate*, 254 P. 875 (Mont. 1927).

As this court stated in *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 (1953),

"It is recognized that the legislature has broad discretionary power to make classifications of persons and property for all purposes which it may lawfully seek to accomplish. So long as the classifications are based upon some legitimate ground of difference between the persons or objects classified, are not unreasonable or arbitrary, and bear a reasonable relation to the legislative purpose, such classifications do not violate the constitution." 73 Idaho at 539-540.

It is our opinion that the state has a legitimate interest in promoting the prompt administration of estates and that the statute in question promotes this interest by curtailing litigation over the appointment of administrators. In addition it is supported by the presumption of constitutionality.

The respondent also contends that I.C. § 15-314 violates the newly enacted Idaho Civil Rights Act. I.C. § 18-7301 et seq. That act, however, provides a remedy for, among other things, sexual discrimination in employment or public accommodations. It is our opinion that it is inapplicable here. Moreover, the legislature could not have intended by that enactment to prohibit all discrimination based on sex. As in the case with the equal protection clause of the Fourteenth Amendment, discrimination based upon the differences between men and women which is not wholly irra-

tional or arbitrary and which is utilized to accomplish a legitimate objective is not condemned.

The judgment of the district court is reversed and the order of the probate court awarding letters of administration to the appellant is reinstated. Costs to appellant.

McQUADE, SHEPARD and SPEAR, JJ., and FELTON, D.J.,
concur.

**Notice of Appeal to the Supreme Court
of the United States**

IN THE
SUPREME COURT
OF THE STATE OF IDAHO
No. 10417

SALLY M. REED,

Plaintiff-Respondent,

v.

CECIL R. REED, Administrator in the Matter of the
Estate of Richard Lynn Reed, Deceased,

Defendant-Appellant.

Notice is hereby given that Sally M. Reed, Plaintiff-Respondent above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Idaho, reversing the judgment of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, and declaring Idaho Code 15-314 constitutional, entered in this action on February 11, 1970. Petition for rehearing was denied on March 24, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

ALLEN R. DERR
Counsel for Plaintiff-Respondent

June 16, 1970

LIBRARY.

Supreme Court, U.S.

FILED

JUL 21 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No.

~~438~~

70-4

SALLY M. REED,

Appellant,

—v.—

CECIL R. REED, Administrator, In the Matter of the
Estate of Richard Lynn Reed, Deceased.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IDAHO

JURISDICTIONAL STATEMENT

MELVIN L. WULF

American Civil Liberties

Union Foundation

156 Fifth Avenue

New York, New York 10010

ALLEN R. DERR

817 West Franklin Street

Boise, Idaho 83701

Attorneys for Appellant

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IN THE
Supreme Court of the United States

OCTOBER TERM 1970

No.

SALLY M. REED,

Appellant,

—v.—

CECIL R. REED, Administrator, In the Matter of the
Estate of Richard Lynn Reed, Deceased.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IDAHO

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Idaho, entered on February 11, 1970, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Supreme Court of the State of Idaho is reported at 465 P.2d 635. The opinion of the District Court, Fourth Judicial District, is unreported. Copies of the opinions are set out in the Appendix, *infra*, pp. 1a, 9a.

Jurisdiction

This suit originated through a petition for letters of administration filed by appellant in the Probate Court of the County of Ada, State of Idaho. The judgment of the Supreme Court of the State of Idaho was entered on February 11, 1970. A timely petition for rehearing was denied on March 24, 1970 (App., *infra*, p. 13a). Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Idaho on June 16, 1970 (App., *infra*, p. 16a). On June 24, 1970, Mr. Justice Douglas granted a timely application to extend appellant's time to file her jurisdictional statement to and including July 22, 1970.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *In re Gault*, 387 U.S. 1 (1967); *Loving v. Virginia*, 388 U.S. 1 (1967); *Levy v. Louisiana*, 391 U.S. 68 (1968).

Statutes Involved

Idaho Code, Sec. 15-312 provides:

Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person whom he or she may request to have appointed.

2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. Any of the kindred.
9. The public administrator.
10. The creditors of such person at the time of death.
11. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

Idaho Code, Sec. 15-314 provides:

Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

Question Presented

Whether Idaho Code, Sec. 15-314, which provides that as between persons equally entitled to administer an estate, males must be preferred to females, denies appellant, a woman, the equal protection of the laws.

Statement of the Case*

Richard Lynn Reed, the adopted son of appellant, Sally M. Reed, and appellee, Cecil R. Reed, died intestate on March 29, 1967, in Ada County. According to the respective petitions of his mother, Sally M. Reed, and of his father, Cecil R. Reed, his parents were his only heirs at law.

Sally M. Reed, the appellant, as the decedent's mother, filed her petition for probate of his estate on November 6, 1967. Prior to the time set for the hearing on this petition Cecil R. Reed, the father, also petitioned for letters of administration.

The cause was heard on the petitions for administration of the respective parties, and the probate court entered its order appointing appellee, Mr. Reed. The probate court in entering its order noted that each of the parties was equally entitled to letters of administration under I.C. §15-312, but that Mr. Reed was entitled to a preference by reason of I.C. §15-314, which provides that as between persons equally entitled to administer an estate, males must be preferred to females.

On April 23, 1968, Mrs. Reed appealed to the district court contending that I.C. §15-314 is unconstitutional as a violation of the Idaho Civil Rights Act (I.C. §18-7301 et seq.), the Fourteenth Amendment of the United States Constitution and Art. 1, §1 of the Idaho Constitution. The district court reversed the order of the probate court on

* The Statement of the case is taken *verbatim* from the opinion of the Supreme Court of Idaho, except for the elimination of one sentence not relevant here, and for minor modifications necessary to properly identify the parties.

the ground that I.C. §15-314 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and returned the case to the probate court for a determination, disregarding the preference set out by I.C. §15-314, of who is entitled to the letters of administration. Mr. Reed appealed to the Supreme Court of Idaho contending that the district court erred in holding I.C. §15-314 unconstitutional.

The Idaho Supreme Court, reversing the lower court, held I.C. Section 15-314 constitutional. It said (App., *infra*, pp. 5a-6a):

Philosophically it can be argued with some degree of logic that the provisions of I.C. §15-314 do discriminate against women on the basis of sex. However nature itself has established the distinction and this statute is not designed to discriminate, but is only designed to alleviate the problem of holding hearings by the court to determine eligibility to administer. This is one of those areas where a choice must be made, and the legislature by enacting I.C. §15-314 made the determination.

The legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women"

The Question Is Substantial

Sec. 15-314 of the Idaho Code requires that, as between men and women equally entitled to serve as administrators of estates, men *must* be preferred. That statutory command violates the equal protection clause of the Fourteenth Amendment for it arbitrarily and capriciously subordinates women, as a class, to men.

The discrimination against women which is embodied in Sec. 15-314 is the same kind of arbitrary classification which has been held to deny the equal protection of the laws to Negroes [*Brown v. Board of Education*, 347 U.S. 483 (1954)], to aliens [*Truax v. Raich*, 239 U.S. 33 (1915); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948)]; to children born out of wedlock [*Levy v. Louisiana*, 391 U.S. 68 (1968)], to Chinese [*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)]; and to members of the armed forces [*Carrington v. Rash*, 380 U.S. 89 (1965)].

The justification for the statute put forward by the Idaho Supreme Court is twofold. One is biological, the other practical. Neither can be said to provide the rational basis required constitutionally to justify class legislation.

The biological reason relied on by the court below was said to be that "men are better qualified to act as an administrator than are women" (App., *infra*, p. 6a). The court cited no authority for this shotgun conclusion and indeed admitted it "may not be entirely accurate." Nevertheless, the court said "we are not prepared to say that it is so completely without a basis in fact as to be irrational or arbitrary." *Ibid.*

The trial court saw the issue more clearly. In face of the contention that "men ordinarily have more business

experience than women," it said, "The Court feels that this statement has no basis in fact in this modern age and society. There are occasions when a woman would be more qualified than a man and vice versa." App., *infra*, p. 11a.

Statistics support the conclusion that women are just as likely to be as knowledgeable as men in business affairs and in the problems of administering estates. Today, twenty-nine million or one-third of the nation's workers are women. Four million women are in professional or technical jobs, and another million are managers, officials or proprietors of businesses. [Handbook on Women Workers, 1969, U. S. Department of Labor, p. 90.] In addition, of course, one must also include the countless number of women who handle all the financial affairs of their families.

Notwithstanding this statistical data, as well as the common experience of mankind (or perhaps more accurately, womankind), the Idaho Supreme Court insists that "nature itself" has established the preference. App., *infra*, p. 5a. "Nature" also established the black and white races, but Sec. 15-314 would not survive very long if it required that "Of several persons claiming and equally entitled to administer, whites must be preferred to blacks."

The Court's second justification for Sec. 15-314 was that it "resolve[s] an issue that would otherwise require a hearing as to the relative merits as to which of the two or more petitioning relatives should be appointed." App., *infra*, p. 5a. That is to say, it was convenient to prefer men to women. Perhaps it is, just as it was claimed to be convenient to bar illegitimate children from recovering for the wrongful death of their mother. *Levy v. Louisiana*, 391 U.S. 68, 80-81 (1968) (dissenting opinion). But con-

venience does not permit a state to "draw a line which constitutes an invidious discrimination against a particular class." *Id.* at 71.

The trial court, again, saw the issue more clearly: "There are occasions when a woman would be more qualified than a man and vice versa. This would be the basis of the Court choosing one over the other when they are both equally entitled to be appointed to administer the estate." App., *infra*, p. 11a.* That observation embodies the essential notion of the Fourteenth Amendment's equal protection clause that members of a class be judged by their individual characteristics, not on the basis of characteristics they are irrationally assumed to share with others in their class. See *Stell v. Savannah-Chatham County Board of Education*, 333 F.2d 55 (5th Cir. 1964), cert. denied, 379 U.S. 933 (1964).

The discrimination against women, as a class, which is the essence of this appeal, is by itself so substantial a federal question that jurisdiction should be noted for that reason alone. But the discrimination inherent in this case is only one example of a wider pattern of discrimination against women which infects many areas of American society. Exploration of the broader pattern can very properly be begun in this case where the act of discrimination is very visible and easily subject to traditional constitutional standards. A few examples of other kinds of dis-

* Sec. 15-312(2), Idaho Code, requires the appointment of "The children" as administrator. Though Sec. 15-314 would require sons to be given preference to daughters, the statute is silent about selection from among several sons. Presumably, the court makes a judgment about which of several sons is best qualified. The same kind of judgment can be made as between men and women.

crimination suffered by women will indicate the pervasive nature of the problem.*

Women are denied access daily to public accommodations. They are often excluded from restaurants and taverns if not accompanied by a man. Sometimes they are excluded entirely. In *Seidenberg v. McSorleys' Old Ale House*, No. 69 Civil 2788 (S.D.N.Y.), a tavern notorious for its ancient rule forbidding entry of women, was ordered to end its discrimination. The Court found that the State's pervasive regulation of taverns was "sufficient State involvement to make the acts of the licensee those of the State itself."

A bill (Intro. 189) has been introduced in the New York City Council to prohibit discrimination against women in the rental of apartments.

Rejecting for Mississippi the decision in *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966), where a three-judge court held that Alabama's exclusion of women from jury service violated the equal protection clause, the Mississippi Supreme Court in *State v. Hall*, 187 So. 2d 861 (1966), held:

"The legislature has the right to exclude women so that they may continue their service as mothers, wives and homemakers, and also to protect them (in some areas they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial."

Compare *Hoyt v. Florida*, 368 U.S. 57 (1961).

* The subject is examined in detail in Kanowitz, *Women and the Law* (Univ. of New Mexico Press, 1969) and Bird, *Born Female* (Pocket Book, 1969).

Women are not only victims of discrimination themselves, but are occasionally instruments for imposing criminal sanctions upon men for conduct which is otherwise deemed not criminal. Thus, Sec. 13-377 of the Arizona Criminal Code makes it a misdemeanor to use "vulgar, abusive or obscene language" within earshot of "any woman or child."

In New York State, Sec. 3771 (6) of the Social Services Law allows confinement of girls as a "person in need of supervision" up to age eighteen. Boys can be confined under the same law only until they are sixteen.

The law affecting marriage abounds with examples of discrimination against women.

Eleven states still place some kind of restriction on the capacity of a married woman to execute a contract. Kano-witz, *supra* at 55-56. In various states a married woman's right to serve in a position of trust is limited, as is her right to sue and be sued in her own name or to engage in business. *Id.* at 56-59.

Sixteen years after *Brown v. Board of Education*, *supra*, women can still be barred from attending public educational facilities. *Allried v. Heaton*, 336 S.W.2d 251, appeal dismissed, 364 U.S. 517 (1960); *Heaton v. Bristol*, 317 S.W. 2d 86, appeal dismissed, 359 U.S. 230 (1959). Cf. *Kirstein v. Rector and Visitors*, 309 F. Supp. 184 (E.D. Va. 1970).

These are only a few examples of the kinds of discrimination to which women as a class are subjected. Taken together, they constitute a widespread pattern of irrational classification based upon myths and dated notions regarding woman's role in society. The case at bar presents one issue typical of this class of cases and raises a substantial federal question which has application well beyond the confines of the particular case.

CONCLUSION

For all the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

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Attorneys for Appellant

July 21, 1970

Counsel wish to acknowledge the assistance of Miss Eve Cary, third year law student at New York University Law School, in the preparation of this Statement.

APPENDIX

Opinion of the Supreme Court of the State of Idaho

**IN THE
SUPREME COURT OF THE STATE OF IDAHO**

No. 10417

Boise, November 1969 Term

Filed: Feb 11 1970

Martin V. Huff, Clerk

SALLY M. REED,

Plaintiff-Respondent,

v.

**CECIL R. REED, ADMINISTRATOR In the Matter of the
Estate of Richard Lynn Reed, Deceased,**

Defendant-Appellant.

Appeal from the District Court of the Fourth Judicial District, Ada County. Hon. Charles R. Donaldson, District Judge.

Appeal from order and judgment of district court reversing order of probate court appointing administrator. Order and judgment of district court *reversed*.

Charles S. Stout, Boise, for appellant.

Derr, Derr & Walters, Boise, and Robert F. McLaughlin, Mountain Home, for respondent.

McFADDEN, C.J.

Richard Lynn Reed, the adopted son of Sally M. Reed and Cecil R. Reed, died intestate on March 29, 1967, in Ada County. According to the respective petitions of his mother Sally M. Reed, and of his father, Cecil R. Reed, his parents were his only heirs at law.

Sally M. Reed, the respondent herein, as the decedent's mother, filed her petition for probate of his estate on November 6, 1967. Prior to the time set for the hearing on this petition, Cecil R. Reed, the father, also petitioned for letters of administration.

The Ada County probate judge deemed himself disqualified to act and the cause was heard before another probate judge, pursuant to stipulation. The cause was heard on the petitions for administration of the respective parties, and the probate court entered its order appointing appellant Reed (the father). The probate court in entering its order noted that each of the parties was equally entitled to letters of administration under I.C. § 15-312, but that Mr. Reed, the appellant, was entitled to a preference by reason of I.C. § 15-314, which provides that as between persons equally entitled to administer an estate, males must be preferred to females.

On April 23, 1968 the respondent (the mother) appealed to the district court contending that I.C. § 15-314 is unconstitutional as a violation of the Idaho Civil Rights Act (I.C. § 18-7301 et seq.), the Fourteenth Amendment of the United States Constitution and Art. 1, § 1 of the Idaho Constitution. The district court reversed the order of the probate court on the ground that I.C. § 15-314 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and returned the case to the

probate court for a determination, disregarding the preference set out by I.C. § 15-314, of who is entitled to the letters of administration. The appellant has appealed to this court contending that the district court erred in holding I.C. § 15-314 unconstitutional.

I.C. § 15-312 provides that

“Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother. . . .”

This section is followed by I.C. § 15-314 which provides that

“Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.”

Since, then, under I.C. § 15-312 a father and mother are “equally entitled” to letters of administration, the father has a preference by virtue of I.C. § 15-314.

This court has said before that the priorities established by I.C. § 15-312 are mandatory, leaving no room for discretion by the court in the appointment of administrators. *Vaught v. Struble*, 63 Idaho 352, 120 P.2d 259 (1941). Similarly the preference given males by I.C. § 15-314 is also mandatory; the statute itself says that males must be preferred to females. Other courts construing similar

provisions have also held that the preference is mandatory. In *re Coan's Estate*, 64 P. 691 (Cal. 1901).

The respondent, however, contends that I.C. § 15-314 violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution because the discrimination against females as a class is not based upon any rational policy, but rather is arbitrary and capricious. She contends that there is no justifiable basis for granting males a preference merely on the basis of sex.

It is well settled that the equal protection clause of the Fourteenth Amendment does not preclude the legislature from making classifications and drawing distinctions between classes. It merely prohibits classifications which are arbitrary and capricious. *Griffin v. Illinois*, 351 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585 (1956); *Morey v. Doud*, 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344 (1957); *McLaughlin v. Florida*, 379 U.S. 184, 13 L.Ed. 2d 222, 85 S.Ct. 283 (1964). It is for the courts to determine in each instance whether a particular classification rests upon rational grounds or is in fact without justification and arbitrary. *Carrington v. Rash*, 380 U.S. 89, 13 L.Ed. 2d 675, 85 S.Ct. 775 (1965); *McLaughlin v. Florida*, *supra*,

It is equally well settled that legislative enactments are entitled to a presumption of validity and that a classification will not be held unconstitutional absent a clear showing that it is arbitrary and without justification. *Rowe v. City of Pocatello*, 70 Idaho 343, 218 P.2d 695 (1950).

I.C. § 15-312 classifies individuals as to their relationship to a decedent and gives to those most closely related to the decedent a preference for appointment as administrator. This classification is basically in accord with the law as to the intestate succession of property in Idaho.

I.C. § 14-103. Those first entitled to succeed to the property have a priority over subsequent successors insofar as entitlement to administer is concerned. This is a basic and rational classification insofar as I.C. § 15-312 is concerned. However, unlike determination of succession of property where a court may award to individuals in a class a proportionate share of property without complication, the naming of an administrator out of a particular class becomes more involved. Generally only one administrator is named, although by joint petition it is possible for joint administrators to be named from a particular class.

When two or more persons of a class, as established by I.C. § 15-312, individually seek administration of an estate, the court is faced with the issue of which one should be named. By I.C. § 15-314, the legislature eliminated two areas of controversy, i.e., if both a man and a woman of the same class seek letters of administration, the male would be entitled over the female, the same as a relative of the whole blood is entitled over a relative of the same class but of only the half blood. This provision of the statute is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits as to which of the two or more petitioning relatives should be appointed.

Philosophically it can be argued with some degree of logic that the provisions of I.C. § 15-314 do discriminate against women on the basis of sex. However nature itself has established the distinction and this statute is not designed to discriminate, but is only designed to alleviate the problem of holding hearings by the court to determine eligibility to administer. This is one of those areas where a choice must be made, and the legislature by enacting I.C. § 15-314 made the determination.

The legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women. As the United States Supreme Court pointed out in *Morey v. Doud*, supra,

“A classification having some reasonable basis does not offend against that clause [equal protection clause] merely because it is not made with mathematical nicety or because in practice it results in some inequality.

• • • One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.’ *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369.” 77 S.Ct. at 1349.

While this classification may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary. We are concerned only with whether the classification is so irrational and arbitrary that it violates the constitution, and it is our opinion that it is not.

States have recognized the validity of classifications based upon sex in a variety of situations. See 2 Stan. L. Rev. 691. This court has held that a woman cannot bind her separate property by signing an appeal bond when it is not for her own use and benefit. See *Craig v. Lane*, 60 Idaho 178, 89 P.2d 1003 (1939). There are also several other cases from other jurisdictions upholding statutes discriminating on the basis of sex when there is a rational basis for distinguishing between the sexes. See *State v. Hunter*, 300 P.2d 455 (Ore. 1956); *Patterson v. City of Dallas*, 355 S.W.2d 838 (Tex. Civ. App. 1962); *State v.*

Hollman, 102 S.E.2d 873 (S.C. 1958); *Eskridge v. Division of Alcoholic Beverage Control*, 105 A.2d 6 (N.J. Super. 1954); *State v. Emery*, 31 S.E.2d 858 (N.C. 1944); *In re Mahaffay's Estate*, 254 P. 875 (Mont. 1927).

As this court stated in *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 (1953),

"It is recognized that the legislature has broad discretionary power to make classifications of persons and property for all purposes which it may lawfully seek to accomplish. So long as the classifications are based upon some legitimate ground of difference between the persons or objects classified, are not unreasonable or arbitrary, and bear a reasonable relation to the legislative purpose, such classifications do not violate the constitution." 73 Idaho at 539-540.

It is our opinion that the state has a legitimate interest in promoting the prompt administration of estates and that the statute in question promotes this interest by curtailing litigation over the appointment of administrators. In addition it is supported by the presumption of constitutionality.

The respondent also contends that I.C. § 15-314 violates the newly enacted Idaho Civil Rights Act. I.C. § 18-7301 et seq. That act, however, provides a remedy for, among other things, sexual discrimination in employment or public accommodations. It is our opinion that it is inapplicable here. Moreover, the legislature could not have intended by that enactment to prohibit all discrimination based on sex. As is the case with the equal protection clause of the Fourteenth Amendment, discrimination based upon the differences between men and women which is not wholly irra-

tional or arbitrary and which is utilized to accomplish a legitimate objective is not condemned.

The judgment of the district court is reversed and the order of the probate court awarding letters of administration to the appellant is reinstated. Costs to appellant.

McQUADE, SHEPARD and SPEAR, JJ., and FELTON, D.J.,
concur.

Opinion of the District Court, Fourth Judicial District**IN THE
DISTRICT COURT****OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO****IN AND FOR THE COUNTY OF ADA****Civil No. 40834****MEMORANDUM DECISION AND ORDER**

**In the Matter of the Estate of
RICHARD LYNN REED, Deceased.**

This matter is before the Court on appeal from the Probate Court of Ada County Idaho. The point in question is whether I.C. 15-314 is constitutional. This act provides that in the appointment of persons to administer an estate of a decedent, that of several persons claiming and equally entitled to administer that males must be preferred to females. The parties through their respective counsel have stipulated that the matter be submitted to the Court on briefs and the same have been submitted.

This section of the Probate Code originally appeared in the Probate Practice Act adopted by the first territorial legislature and has been in effect ever since. It was apparently borrowed from California. Montana has a similar statute. The constitutionality has never been questioned in any of these states. A companion statute, I.C. 15-312,

which gives a preference to brothers over sisters has been upheld in each of the states although the precise point which is involved in this case was not raised or argued.

The appellants contend that under the Idaho Civil Rights Act this section is unconstitutional. The Idaho Civil Rights Act, however, applies only to the right to obtain and hold employment and the right to an equal enjoyment of accommodation or public place of amusement, etc. The right to be appointed as administrator is not employment, it is merely a temporary appointment for a temporary purpose. For definition of the word administrator, see WORDS AND PHRASES, Volume Two, Page 291, Section 339. This Court, therefore, does not feel that this section is in conflict with the Civil Rights Law.

The appellant further contends that the statute is unconstitutional since it violates the Fourteenth Amendment to the Constitution of the United States and Article I, Section One of the Constitution of the State of Idaho. First it should be noted that women are not disqualified from being appointed to administer an estate in Idaho since Section 15-314 states that of several persons claiming and *equally* entitled to administer, males must be preferred to females. The Fourteenth Amendment protects all persons without regard to race, color or class and prohibits any state legislation which has the effect of denying to any race, class or individual the equal protection of the laws. The guiding principle of this guarantee of equal protection of the laws requires that all persons be treated alike under like circumstances and conditions both in the privileges conferred and the liabilities imposed. The equal protection clause of the Fourteenth Amendment is a restriction on state governments and includes all departments of

state government including both political and judicial. It is true that a state may classify persons and objects for the purpose of legislation and pass laws applicable only to persons or objects within a designated class. However, class legislation discriminating against some and favoring others is prohibited by the equal protection guarantee. One of the essential requirements as to classification so that it does not violate the constitutional guarantee as to equal protection of laws is that the classification must not be capricious or arbitrary but must be reasonable and natural and must have a rational basis. If it is arbitrary or capricious it is in conflict with the guarantee. The Court can see no reasonable basis for the classification which gives preference of males over females. Counsel for the respondent argues that there is a reasonable base for the classification. He says that men ordinarily have more business experience than women. The Court feels that this statement has no basis in fact in this modern age and society. There are occasions when a woman would be more qualified than a man and vice versa. This would be the basis of the Court choosing one over the other where they are both equally entitled to be appointed to administer the estate. Counsel for the respondent further claims that it would be easier to recover from a man than a woman in the case of defalcation. This again depends on the facts of whether or not the woman is married and whether or not she has separate property. Again these matters are something the Court should weigh in determining which of two persons is best qualified to administer the estate. The mere fact that a person is a male rather than a female is not a valid basis for preference and the Court, therefore, finds this section of the Idaho Code, 15-314, unconstitutional as a violation of the Fourteenth Amendment to the United

States Constitution and Article I, Section One of the Constitution of the State of Idaho.

Originally the appeal was from both questions of law and fact. The parties have stipulated that the appeal is only to questions of law. Therefore, the matter should be returned to the Probate Court for its determination of which of the two parties is best qualified to serve as administrator or administratrix of the estate. It is so Ordered.

Dated and signed this 2nd day of December, 1968.

CHARLES R. DONALDSON
District Judge

Denial of Petition for Rehearing

**SUPREME COURT
STATE OF IDAHO
BOISE, IDAHO**

March 24, 1970

No. 10417

REED V. REED

**Derr, Derr & Walters
Charles S. Stout, Esq.
Attorneys at Law
Boise, Idaho**

**Robert F. McLaughlin, Esq.
Attorney at Law
Mountain Home, Idaho**

Gentlemen:

**In the above entitled cause the Court has today denied
respondent's petition for rehearing.**

Cost awarded to

**MARTIN HUFF
Clerk of the Supreme Court**

**Notice of Appeal to the Supreme Court
of the United States**

**IN THE
SUPREME COURT
OF THE STATE OF IDAHO**

No. 10417

SALLY M. REED,

Plaintiff-Respondent,

v.

**CECIL R. REED, Administrator in the Matter of the
Estate of Richard Lynn Reed, Deceased,**

Defendant-Appellant.

Notice is hereby given that Sally M. Reed, Plaintiff-Respondent above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Idaho, reversing the judgment of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, and declaring Idaho Code 15-314 constitutional, entered in this action on February 11, 1970. Petition for rehearing was denied on March 24, 1970.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

ALLEN R. DERR

Counsel for Plaintiff-Respondent

June 16, 1970

Judgment

**IN THE
SUPREME COURT
OF THE STATE OF IDAHO**

No. 10417

SALLY M. REED,

Plaintiff-Respondent,

v.

**CECIL R. REED, ADMINISTRATOR In the Matter of the
Estate of Richard Lynn Reed, Deceased,**

Defendant-Appellant.

Chief Justice McFadden announced the decision in this cause February 11, 1970, and on denial of petition for rehearing March 24, 1970, to the effect that the judgment of the District Court of the Fourth Judicial District of the State of Idaho, Ada County, is reversed and the order of the probate court awarding letters of administration to the appellant is reinstated. Costs to appellant in the sum of \$48.80.

IT IS NOW THEREFORE SO ORDERED.

Date of remittitur—March 24, 1970.

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED

SEP 17 1970

E. ROBERT SEAVER, CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term 1970

No. ~~430~~

70-4

SALLY M. REED,

Appellant,

v.

**CECIL R. REED, Administrator, In the Matter of the
Estate of Richard Lynn Reed, Deceased.**

Appellee.

**Appeal from the Supreme Court
of the State of Idaho**

MOTION TO DISMISS APPEAL

**MYRON E. ANDERSON
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Boise, Idaho 83702**

**CHARLES S. STOUT
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Boise, Idaho 83702**

ATTORNEYS FOR APPELLEE

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1970

No. 430

SALLY M. REED,

Appellant,

v.

CECIL R. REED, Administrator, In the Matter of
the Estate of Richard Lynn Reed, Deceased.

Appellee.

Appeal from the Supreme Court
of the State of Idaho

MOTION TO DISMISS APPEAL

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellee moves to dismiss the appeal in the above entitled action upon the following grounds:

I.

That the right to be appointed administrator of

a decedent's estate in Idaho is limited to residents of Idaho and is not a right protected by the Fourteenth Amendment to the Constitution of the United States.

Idaho Code, Sec. 15-317

II.

That the question involved is one of probate procedure in the administration of a decedent's estate, and is not a matter within the jurisdiction of this Court.

Idaho Code, Sec. 1-1201.

Idaho Code, Sec. 1-1202 as amended by
1965 Idaho Session Laws, Ch. 167, p.328.

Idaho Code, Sec. 1-1203.

O'Callaghan v. O'Brien, 199 U.S. 89 (1905).

Sutton v. English, 246 U.S. 199 (1918).

Markham v. Allen, 326 U.S. 490 (1946).

Note 158 ALR, p. 62

Federal Practice and Procedure,
32 Am Jur. 2d. p. 435, Sec. 32.

III.

That for the reasons hereinbefore set forth, the judgment rests on an adequate, non-Federal basis.

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ATTORNEYS FOR APPELLEE

IN THE

E. ROBERT SEAVER, CLERK

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~430~~

70-4

SALLY M. REED;

Appellant,

—v.—

CECIL R. REED, Administrator, In the Matter of the
Estate of Richard Lynn Reed, Deceased.

JOINT SUPPLEMENTAL BRIEF

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1970

No. 430

SALLY M. REED,

Appellant,

—v.—

CECIL R. REED, Administrator, In the Matter of the
Estate of Richard Lynn Reed, Deceased.

JOINT SUPPLEMENTAL BRIEF

By order dated October 12, 1970, the Court requested counsel to file supplemental briefs "on the question of the residence of each of the litigants at the time of the instigation of this litigation."

As set out in the stipulation in the Appendix, *infra*,¹ there is no issue as to residency. Both parties were residents of Idaho at the time the litigation was begun, and both parties continue to be residents of Idaho.

¹ The original copy of the stipulation has been filed with the Clerk of the Court.

Respectfully submitted,

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November 1970

APPENDIX

Stipulation as to Residency

IN THE
SUPREME COURT
OF THE UNITED STATES

SALLY M. REED,

Plaintiff-Appellant,

—v.—

CECIL R. REED, Administrator, In the Matter of the
Estate of Richard Lynn Reed, Deceased,

Defendant-Respondent.

COMES NOW, The parties above named by and through their Idaho counsel of record and stipulates that at all times pertinent to this cause both parties were and are residents of the State of Idaho.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. ~~456~~

70-4

SALLY M. REED,

Appellant,

v.

CECIL R. REED, Administrator, In the matter of the
Estate of Richard Lynn Reed, deceased

JOINT BRIEF OF AMICI CURIAE

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REED v. REED - No. 430, OCTOBER TERM, 1970
JOINT BRIEF OF AMICI CURIAE
AMERICAN VETERANS COMMITTEE, INC.
NOW LEGAL DEFENSE AND EDUCATION FUND, INC.

INTEREST OF THE AMICI CURIAE

The American Veterans Committee, Inc. (AVC) is a nationwide organization of veterans who served honorably in the Armed Forces of the United States during World War I, World War II, Korean Conflict and Vietnam Conflict, and who have associated themselves, regardless of race, color, religion, sex, or national origin, to promote the democratic principles which they fought to preserve. AVC was founded in 1943 and its membership includes both men and women who participate in AVC's affairs in full equality.

The NOW Legal Defense and Education Fund, Inc. is the legal-aid arm of the National Organization for Women, Inc. (NOW), a nationwide organization of men and women who have associated themselves, regardless of race, color, religion, sex, or national origin, "to bring women into full participation in the mainstream of American society NOW, exercising all the privileges and responsibilities therein truly equal partnership with men." One of NOW's objectives is "to isolate and remove patterns of sex discrimination, to ensure equality of opportunity in employment and education, and equality of civil and political rights and responsibilities on behalf of women, as well as for Negroes and other groups." (NOW's Statement of Purpose at Organizing Conference, Oct. 29, 1966.)

This case starkly presents for decision by this Court the issue whether a statute can constitutionally deny to women, solely because of their sex, a right which is granted to all others and the exercise of which is not materially relevant to the functional or structural differences of sex.

Arbitrary sex discriminations in our legal system resulting from ancient prejudices, assumptions and stereotypes

have lingered on despite the mandate of the 14th Amendment's Equal Protection Clause. This is largely because various courts, like the Idaho Supreme Court in this case, have mechanically accepted the idea that since the common law treated men and women differently and since "men and women are not identical," any difference in the legal classification of men and women is constitutional no matter how irrelevant to the function of sex.¹ See footnote 12, *infra*. But such an approach has failed to recognize that their rights as "persons" are protected by the Equal Protection Clause from any discrimination not necessitated by the difference of sex.²

We believe that discriminations based on sex are, in most instances, as unjustifiable and as unconstitutional as the discriminations based on race which this Court has so roundly condemned. For the reasons stated below, we contend that the sex discrimination perpetuated by sections 15-312 and 15-314, Idaho Code, violate the Equal Protection Clause of the 14th Amendment.

¹ Oliver Wendell Holmes, later a Justice of this Court, perceptively noted, in his classic *The Common Law*, p. 5 (1881):

"A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains."

See also Roscoe Pound, "Mechanical Jurisprudence," 8 Colum. L. Rev. 605 (1908).

² The continuance of sex discrimination in our legal system and the widely felt need to remedy the resulting injustices have stimulated a national demand for a constitutional amendment declaring that "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." 91st Cong.: H. J. Res. 264, S.J. Res. 61; 92nd Cong.: H.J. Res. 208, 231, 35; S.J. Res. 8, 9. The history of the drive for this Amendment reflects dissatisfaction with the slow pace of judicial attack on sex discriminatory laws, not belief that this Court lacks power to do so under the 14th Amendment. See Hearings cited in footnote 6, *infra*.

THE ISSUE

Does section 15-314 of the Idaho Code—which specifies that “males must be preferred to females” as between several petitioners for letters of administration who are in the same preference class of entitlement to administer an estate—deny equal protection of the laws to a woman whose petition for letters of administration is denied, in favor of a male petitioner of the same preference class, solely because of that statute?

THE FACTS

Richard Lynn Reed, the adopted son of appellant Sally M. Reed and appellee Cecil R. Reed, died in March 1967, in Idaho. He left no will. His parents were his only heirs-at-law. Sally, as the decedent's mother, filed her petition for probate of his estate in November 1967. Before the time set for hearing on the petition, Cecil, the father, also petitioned for letters of administration. The probate judge appointed the father as administrator. His order noted that Cecil and Sally were equally entitled to letters of administration, because they were both in class 3 under section 15-312, Idaho Code (1948 ed.).³ However, he ruled that

³“Section 15-312. *Priorities in right of administration.*—Administration of the estate of a person dying intestate must be granted to someone or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

- “1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. Any of the kindred.
9. The public administrator.
10. The creditors of such person at the time of death.
11. Any person legally competent.

[continued]

the father was entitled to preference because another section (15-314) provides that, as between persons "equally entitled to administer" an estate, "males must be preferred to females."⁴

On Mrs. Reed's appeal, Judge Donaldson of Idaho's Fourth Judicial District Court reversed the probate court's order. He held that section 15-314 violated the Equal Protection Clauses of both the U.S. Constitution (14th Amendment) and the Idaho Constitution (Art. I, section 1), and remanded the matter to the probate court to determine "which of the two parties is best qualified to serve as administrator or administratrix of the estate."

On appeal by the father, the Idaho Supreme Court upheld the constitutionality of section 15-314 and reversed the district court. *Reed v. Reed*, 93 Ida. 511, 465 P.2d 635 (1970).

SUMMARY OF ARGUMENT

The mandatory priority which section 15-314, Idaho Code, gives to men over women when several persons of the same preference class apply for appointment as administrator of an estate is purely sex-based—"simply that and nothing more." Its discrimination is greatly similar to race discrimination:—Both are based on the assumption that women (racial groups) are inferior, and on a status thrust upon them by birth which they cannot change. Both lack necessary, fair, substantial and rational relationship to the objec-

[Footnote 3 continued]

"If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate." [Prob. Prac. 1864, section 52; R.S., R.C., & C.L., section 5351; C.S., section 7487; I.C.A., section 15-312; am. 1943, ch. 162, section 1, p. 340.]

⁴"Section 15-314. *Preferences.*—Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood." [Prob. Prac. 1864, section 53; R.S., R.C., & C.L., section 5352; C.S., section 7488; I.C.A., section 15-314.]

tive of the statute. In both cases, the discrimination is imposed on "easily identifiable groups" which are grossly underrepresented in the decision-making processes, are easy targets of both public and private discrimination, and have a history of unduly slow progress toward legal and political equality in the face of considerable resistance; and the resulting legal distinctions have prolonged the inferiority status of both groups and, in fact, have reinforced it.

Any law imposing such discrimination is constitutionally suspect and subject to the most rigid scrutiny. Even if it were enacted pursuant to a valid state interest, it bears a heavy burden of justification and will be upheld only if it is necessary, not merely rationally related, to the accomplishment of a permissible state policy.

Uncritical acceptance of the notion that "*sex per se* is a valid basis for classification" has caused many courts to disregard the truism that a woman is a "person" entitled to the guarantee of Equal Protection. However, there is a growing judicial recognition that sex discrimination imposed by law is, in most instances, as unconstitutional as is race discrimination.

None of the rationalizations offered by the Idaho Supreme Court can constitutionally justify section 15-314. The assertion that the state law helps to avoid hearings to determine qualifications of competing applicants does not justify the invidious and arbitrary discrimination it imposes on women. Hearings will still be required not only to determine basic qualifications but also whenever the competing applicants are all male or all female. The discrimination is applied only against women when a male applicant seeks appointment. The asserted justification for the statute is thus so much more tenuous than many other justifications for invidious discrimination heretofore rejected by this Court as to be really fictional. It is plain that it would not be accepted if the statute had involved priority as between white and Negro applicants. It should not be accepted

here where the necessary and rational relationship between the distinction (sex or race) and the permissible statutory objective is equally lacking.

The Idaho court's assumption that women are less qualified than men to act as administrator is inconsistent with the principle that constitutional rights must be protected for each person rather than averaged between groups. In addition, its assumption is contradicted by Census data showing that women are not so inferior in education, business experience, participation in civic matters, and talent. Furthermore, none of the precedents cited by the Idaho court support the constitutionality of the sex discrimination in sec. 15-314.

Therefore, the decision below should be reversed, so that the probate court can determine which of the applicants "is best qualified to serve as administrator or administratrix of the estate."

ARGUMENT

I.

A WOMAN IS A "PERSON" ENTITLED TO EQUAL PROTECTION OF THE LAWS AGAINST INVIDIOUS DISCRIMINATION BASED ON SEX.

We start with the truism that a woman is a "person" within the protection of the 14th Amendment. That Amendment forbids any State to "deny to any person . . . the equal protection of the laws," which, as this Court pithily put it 85 years ago, "is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). This Court has recognized the applicability of the Equal Protection Clause to a woman in various types of cases not specifically involving sex discrimination. *E.g.*, cases involving racial discrimination: *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (Negro woman); *Brown v. Board of Education*, 347 U.S. 497 (1954) (Negro girl); *Adickes v. Kress Co.*, 398 U.S. 144 (1970) (white woman with Negroes);

and even discriminatory state taxation: *Hillsborough v. Cromwell*, 326 U.S. 620 (1946) (wealthy Doris Duke Cromwell). But there has been far less recognition that invidious sex discrimination also violates the Equal Protection Clause.

- A. A sex characteristic is rarely a proper basis for legislative distinctions. There must, in addition, be a necessary and material relation between the legislative distinction and the legitimate objective of the legislation.

We agree, of course, that sex is a significant and fundamental difference between men and women. However, that difference does not provide a valid basis for making legal distinctions between men and women if the legal distinctions are not directly and materially related to the physical characteristics unique to one sex. Thus, a law relating to wet nurses, or regulating or restricting the donation of sperm, or concerning the provision of obstetrical services or voluntary maternity benefits, or punishing forcible rape, or imposing paternity responsibilities, or regulating certain homosexual acts, or permitting employers to discriminate on the basis of sex when they employ persons to model male, or female, clothing—would not violate the Equal Protection Clause simply because the law relates to one sex. This is because that law relates to a characteristic that is unique to one sex.

Where the law makes distinctions that are not based on characteristics obviously unique to one sex, however, the Equal Protection Clause demands that the government justify the distinction as having a necessary relationship to a valid legislative objective. The relationship must be necessary, not simply conceivably possible. Indeed, even if a particular characteristic or activity is found more often, *but not always*, in one sex, to treat all members of that sex differently than all members of the other sex would violate the Equal Protection Clause.

The emphasis upon sex alone as the basis for the legal distinction ignores the fact that the characteristics or activity being legislated on are the same despite the sex of the individuals, and applies a sex distinction to a situation where sex is irrelevant to the legitimate purpose of the legislation. This is precisely what happens in a racial discriminatory law—race is made the basis for the distinction in treatment despite the fact that the activity being legislated on is the same for persons of all races. In such cases, this Court has not hesitated to strike down such laws because the distinction (race) has had no rational bearing on that activity.

The guarantee of Equal Protection against invidious discrimination of race, or sex, rests upon a principle which was articulated with great precision by the Equal Employment Opportunity Commission in its regulations on sex discrimination in employment under Title VII of the Civil Rights Act of 1964 (29 Code of Fed. Reg. 1601.1(a)(ii): "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." See *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 234-236 (C.A. 5, 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 717-718 (C.A. 7, 1969).

The fact that there are many sex-based distinctions in American laws, customs and practices does not mean that biologic differences between the sexes give *carte blanche* constitutional immunity to every governmentally-imposed sex discrimination. On the contrary, a law with sex-based distinctions—which disregard individual abilities and capacities and are not rationally related to the factor of sex—results in the invidious discrimination which is condemned by the 14th Amendment's guarantee of "Equal Protection of the Laws."

The crux of this case is that although Idaho may constitutionally regulate the appointment of administrators of estates, it may not make a distinction between men and

women which is not rationally related to the duties or functions of an administrator.

The 14th Amendment prohibits the State from making arbitrary and unreasonable classifications in connection with an activity the State may otherwise regulate.

This Court has often ruled that the "ultimate test of validity" of a classification is whether it has a fair and substantial relation to the object which the legislature seeks to accomplish—whether the statute has a rational basis—"whether the differences . . . are pertinent to the subject with respect to which the classification is made." *Asbury Hospital v. Cass County*, 326 U.S. 207, 214 (1945); *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 583 (1935); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Rinaldi v. Yeager*, 384 U.S. 304, 308-309 (1966); *Baxstrom v. Herold*, 383 U.S. 107, 111, 115 (1966). When a law singles out a distinct class of persons "for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." *Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

More than 70 years ago, this Court emphasized, in *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 155 (1897), that a classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." And this Court admonished that "arbitrary selection can never be justified by calling it classification." (*Ibid.* at 159). In order to be valid under the Equal Protection Clause "a statutory discrimination must be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud*, 354 U.S. 457, 465 (1957); *Smith v. Cahoon*, 283 U.S. 553, 567 (1931). "... the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

This Court has repeatedly ruled that where a statutory classification adversely affects the rights of a person, the "classification which might invade or restrain them must be closely scrutinized and carefully confined," *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966), and that the State must carry the burden of proving that the classification is rationally related to the objective of the statute. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); *Bates v. Little Rock*, 361 U.S. 516, 524-527 (1960); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Shelton v. Tucker*, 364 U.S. 479, 489 (1961). The State does not carry that burden by simply "a showing of equal application among the members of the class defined by the legislation;" in addition, "courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose." *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *Carrington v. Rash*, 380 U.S. 89, 93 (1965). In making such determination, this Court has applied the severe standard of "necessary" to a statute which "trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld *only if it is necessary, and not merely rationally related*, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, *supra*, at 196. (Emphasis supplied).

B. Sex and race discrimination are greatly similar and deserve similar constitutional treatment.

Most of the sex distinctions now present in many statutes are as irrelevant to the legislative purpose of the statute as were the governmental racial distinctions which this Court held unconstitutional in the past two decades.⁵

⁵For example, *Oyama v. California*, 332 U.S. 633 (1948) (land ownership by U.S. citizen of Japanese ancestry); *Shelley v. Kraemer*,

There is great similarity between racial and sex discriminatory statutes. Each type generally reflects the ancient canards about the "inferiority" of women and Negroes (or oriental, or other proscribed race). See, e.g., Gunnar Myrdal, *An American Dilemma*, Appendix 5, pp. 1073-1078 (1944); H. M. Hacker, "Women as a Minority Group," 30 *Social Forces* 60 (Oct. 1951) (reprints available from U.S. Women's Bureau). Both women and racial minorities are "easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws." *Hernandez v. Texas*, 347 U.S. 475, 478 (1954). Both are grossly under-represented in Federal, State and local formal decision-making processes. Thus, both are easy targets of both public and private discrimination. Secondly, the history of both women and racial minorities has been marked by unduly slow progress toward legal and political equality, often in the face of considerable resistance from the dominant group. Thirdly, the resulting legal distinctions have prolonged the inferiority status of both groups and, in fact, have reinforced it.

The special significance of both racial and sex discrimination imposed by law is that each is based on a status which was thrust upon the person without his or her volition and which he or she is powerless to change. It is fundamentally unfair, and therefore unjustifiable under the Equal Protection Clause, to impose a discrimination upon a person solely because of his or her inherited characteristics such as race, color, national ancestry or sex, unless there is a necessary, substantial and rational relationship between such a distinction and the legitimate purpose of the statute.

[Footnote 5 continued]

334 U.S. 1 (1948) (racial land covenants); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (right of persons of Japanese ancestry to work); *Sweatt v. Painter*, 339 U.S. 629 (1950) (exclusion of Negro from law school); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (racial segregation in university classroom); *Brown v. Board of Education*, 347 U.S. 483 (1954) (racial discrimination in public schools); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (racial discrimination in housing).

The long course of race litigation has rendered the courts sensitive to the fact that race generally lacks such necessary and rational relationship and hence is an invalid statutory distinction. *Ray v. Blair*, 343 U.S. 214, 226, footnote 14 (1952) ("... a requirement of color, as we have pointed out before, is not reasonably related to any legitimate legislative objective."); *Loving v. Virginia*, 388 U.S. 1 (1967).

The principle, however, is not limited to race. For example, the same principle has been applied to the status of illegitimate birth where the statute "created an insurmountable barrier" which prevented the child from suing for the death of the mother. *Levy v. Louisiana*, 391 U.S. 68 (1968); cf. *Labine v. Vincent*, ___ U.S. ___ (No. 5257, March 25, 1971) (upholding a statute denying an illegitimate child inheritance rights in the father's estate because the father, who had opportunity to do so, had not legitimated the child as required by state law). Another example of the same principle is *Robinson v. California*, 370 U.S. 660 (1962) which held that punishing a person solely because of his involuntary status, i.e., illness, is cruel and unusual punishment violating the 8th and 14th Amendments.

It is this principle—that it is fundamentally unfair to legislate against a person solely because of his or her birth—which underlies the doctrine that "legal restrictions which curtail the civil rights of a single racial group" are "constitutionally suspect", *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and are subjected to "the most rigid scrutiny". *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 420 (1948).

Because sex and race discrimination are so similarly based and motivated, they deserve similar constitutional scrutiny and treatment. Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (invalidating sterilization statute because it "made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.")

C. There is growing judicial recognition that sex discrimination imposed by law is unconstitutional.

Lack of systematic study of sex-based discriminations is perhaps the principal reason why the courts have been less vigorous in recognizing that irrational governmentally-imposed discrimination is as great an evil, and as unconstitutional, when it is sex-based as when it is race-based. It is only since the mid-sixties that the nation has begun to examine the extent of sex discrimination in our laws and practices and its grievous impact upon the rights and welfare of people (principally women, and in some instances men).⁶

Nevertheless, there is already a considerable body of judicial decisions invalidating various forms of sex discrimination

⁶See, for example, Kanowitz, *Women and the Law* (1969);

American Women, Rept. of President's Commission on the Status of Women, and reports of its seven Committees on: Civil and Political Rights; Education; Federal Employment; Home and Community; Private Employment; Protective Labor Legislation; Social Insurance and Taxes (1963);

Reports, Interdepartmental Committee and Citizens Advisory Council on the Status of Women (1963-64, 1965, 1966, 1963-68);

Reports, National Conferences of Commissions on the Status of Women (1965, 1966, 1968, 1971);

Reports, Task Forces to Citizens Advisory Council on Status of Women on: Family Law and Policy; Health and Welfare; Labor Standards; Social Insurance and Taxes (1968);

A Matter of Simple Justice, Rept., President's Task Force on Women's Rights and Responsibilities (April 1970);

Hearings, *The Equal Rights Amendment*, S.J. Res. 61, 91st Cong., Senate Subcommittee on Constitutional Amendments (May 1970); Hearings, *Discrimination Against Women*, Section 805 of H.R. 16098, 91st Cong., House Special Subcommittee on Education (July 1970); Hearings, *Equal Rights 1970*, S.J. Res. 61 and 231, 91st Cong., Senate Judiciary Committee (Sept. 1970); Hearings, House Judiciary Committee, H.J. Res. 208, 231, 35; and H.R. 916, 92nd Cong. (March-April 1971).

on the ground that the Equal Protection Clause is violated by:

—A statute requiring that women convicted of crime be sentenced to longer term than men convicted of the same crime: *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968); *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D.C. Conn. 1968) (adults); *United States ex rel. Sumrell v. York*, 288 F. Supp. 955 (D.C. Conn. 1968) (minors); *Liberti v. York*, 28 Conn. Sup. 9, 246 A.2d 106 (1968).

—A statute requiring imprisonment of women in penitentiaries for a crime that would put a man into only a local county jail: *Commonwealth v. Stauffer*, 214 Pa. Super. 113, 251 A.2d 718 (1969).

—A statute punishing women, but not men, for engaging in the same immoral conduct: *City of Portland v. Sherrill*, No. M-47623, Circ. Ct. Multnomah County, Ore. (Jan. 9, 1967).

—A statute barring women from serving on state juries: *White v. Crook*, 251 F. Supp. 401, 408 (D.C. Ala. 1966).

—The refusal by a licensed tavern owner to admit women patrons: *Seidenberg v. Old McSorleys' Ale House*, 308 F. Supp. 1253, 1260 (D.C. N.Y. 1969); *Ibid.*, 317 F. Supp. 593 (1970).

—A statute barring women police officers from taking exam for promotion to police sergeant: *Shpritzer v. Lang*, 17 App. Div. 2d 869, 234 N.Y. Supp. 2d 285, 291 (1962), *aff'd*, 13 N.Y. 2d 744, 241 N.Y. Supp. 2d 869, 191 N.E. 2d 919 (1963).

—A statute imposing inheritance taxes on property when devised by husband to wife, but not when devised by wife to husband: *In Re Estate of Legatos*, 1 Calif. App. 3d 657, 81 Calif. Rptr. 910 (1969).

—Judicial refusal to recognize a woman's right to sue, as a man may, for loss of consortium resulting from tortious injury to the spouse: *Owen v. Illinois Baking Co.*, 260 F. Supp. 820, 822 (D.C. Mich. 1966); *Karczewski v. Baltimore & Ohio R.R. Co.*, 274 F. Supp. 169 (D.C. N.D. Ill. 1967); *Millington v. Southeastern Elevator Co.*, 22 N.Y. 2d 498,

239 N.E. 2d 897 (1968); Cf. *Miskunas v. Union Carbide Corp.*, 399 F.2d 847, 850 (C.A. 7, 1968), *contra, cert. den.* 393 U.S. 1066 (1969).

—The refusal by the University of Virginia to admit women as students: *Kirstein v. Rector and Visitors of University of Virginia*, 309 F. Supp. 184 (D.C. Va. 1970); Cf. *Williams v. McNair*, 316 F. Supp. 134 (D.C. S. Car. 1970), *aff'd.* ____ U.S. ____ (No. 1133, O.T. 1970, March 8, 1971) (upheld South Carolina statute limiting its Winthrop College to women students).

Although there have been a number of earlier decisions by this Court which rejected 14th Amendment challenges to certain forms of sex discrimination, none of them justifies the invidious discrimination perpetrated by section 15-314, Idaho Code.

For example, *Bradwell v. State*, 16 Wall. (83 U.S.) 130 (1873) and *In re Lockwood*, 154 U.S. 116 (1894) held that States may deny women the right to practice law, and *Minor v. Happersett*, 21 Wall. (88 U.S.) 162 (1874) upheld a Missouri statute restricting voting to male citizens. This Court's opinions in those cases discussed only the Privileges and Immunities clause. But if the challenge had been based on the Equal Protection Clause it would have fared no better, in view of the philosophy so plainly expressed by Justices Bradley, Field and Swayne in the *Bradwell* case (p. 141) as follows:

“ . . . the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood The paramount destiny and mission of woman are to fulfill the

noble and benign offices of wife and mother. This is the law of the Creator."⁷

Decisions like *Bradwell*, *Lockwood*, and *Minor* would certainly not be repeated today. When this Court on February 23, 1971, prevented Arizona from denying to Mrs. Sara Baird, a person with the requisite qualifications of legal learning and moral character, the right to practice law (*Baird v. State Bar of Arizona*, ___ U.S. ___, No. 15), this Court cited *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957) which held that the Equal Protection clause protects such right. See also *Konigsberg v. State Bar of California*, 353 U.S. 252, 262 (1957). And in *Gray v. Saunders*, 372 U.S. 368, 379 (1963), this Court stated that the Equal Pro-

⁷The Bradley-Field-Swayne philosophy of sex which dominated the *Bradwell*, *Lockwood* and *Minor* decisions is, indeed, quite reminiscent of, and essentially the same as, the race philosophy of *Plessy v. Ferguson*, 163 U.S. 537 (1896) which spawned more than 50 years of judicial sanction for race discrimination before it was overruled in the 1950's. This Court said in *Plessy*:

(p. 544): "The object of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality or a commingling of the two races upon terms unsatisfactory to either."

(p. 544): "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other"

(p. 550): Segregation of white and colored people is "a reasonable regulation" with respect to which the State "is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."

(p. 551): "The [plaintiff's] argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals . . . Legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences"

tection Clause requires equality in voting rights as between men and women and forbids a State from giving greater weight to votes by men than to votes by women.

Another example of an earlier decision which, we believe, would not be repeated today is *Gosselin v. Kelley*, 328 U.S. 817 (1946). It "dismissed for want of a substantial Federal question" an appeal from *Ex parte Gosselin*, 141 Me. 412, 44 A.2d 882 (1945) wherein the Maine Supreme Court upheld a state statute authorizing imprisonment for 3 years of a woman convicted of a misdemeanor (intoxication in a public place), whereas the maximum term for a man convicted of the same crime would not have exceeded 2 years.⁸ Compare the *Daniel, Robinson, Sumrall, Liberti, Stauffer*, and *Sherrill* decisions cited above.

Section 15-314, Idaho Code, can get no comfort from this Court's decisions upholding statutes prohibiting employers from employing women for more than a certain number of hours per day,⁹ or for night work,¹⁰ or in certain occupations.¹¹ Most of these decisions were based on

⁸Maine has since amended its laws, so as to eliminate the disparity of sentences for men and women. Me. R.S., 1964 ed., Title 34, sections 802 and 853, as amended, Me. Pub. Laws, 1967, ch. 391, sections 12 and 18.

⁹*Muller v. Oregon*, 208 U.S. 412 (1908); *Riley v. Massachusetts*, 232 U.S. 671 (1914); *Miller v. Wilson*, 236 U.S. 373 (1915); *Bosley v. McLaughlin*, 236 U.S. 385 (1915).

¹⁰*Radice v. New York*, 264 U.S. 293 (1924).

¹¹*Goesaert v. Cleary*, 335 U.S. 464 (1948). This decision, upholding a statute denying a bartender license to all women except the wife and daughters of the male owner of a liquor shop, rested largely on the unfettered scope long allowed to legislative regulation of liquor sales. Its effect has been weakened or undermined by more recent decisions, changes in laws and practices, and new insights into the invidious effects of sex prejudice and discrimination and their lack of consistency with the constitutional guarantee of "the protection of equal laws." See *Seidenberg v. Old McSorleys' Ale House*, *supra*; *Paterson Tavern & Grill Owners Assn. v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970); Title VII of Civil Rights Act of 1964 (42 U.S.C. 2000e-2); *McCrimmon v. Daley*, 418 F.2d 366, 369-371 (C.A. 7, 1969); *Phillips v. Martin Marietta Corp.*, ___ U.S. ___, 39

the supposition that the different treatment prescribed for women would be beneficial to them. Now, however, there is widespread belief that those laws and decisions were based on erroneous assumptions and therefore resulted in invidious discrimination. Murray and Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 *Geo. Washington L. Rev.* 232 (Dec. 1965); Hearings, Equal Employment Opportunity Commission (May 2 and 3, 1967); Hearings on Equal Rights Amendment cited in *ftnt. 6 supra*; *Mengelkoch v. Industrial Welfare Comm.*, ___ F.2d ___, 39 U.S. Law Week 2419 (C.A. 9, Jan. 11, 1971).

In any event, none of this Court's decisions has expressly postulated that sex *per se* is a sufficient basis for legislative classification treating women differently, or more restrictively, than men.¹² Rather, the opinions in those cases went

[Footnote 11 continued]

U.S. Law Week 4160 (Jan. 25, 1971) (holding that sex discrimination in employment is invalid if not rationally related to the factor of sex).

¹² *Muller v. Oregon*, *supra*, footnote 9, has been often cited for the proposition that "sex *per se* is a valid basis for classification" without regard to the purposes of a particular law or the reasonableness of the relation between that purpose and the sex-based classification. Justice Brewer there said (at pp. 421-422):

[H]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights *Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.* It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an

[continued]

to considerable lengths to define the pertinancies of the classifications to valid and reasonable objectives which the legislatures sought to accomplish. They were based on findings or assumptions that there then was, in fact, such rational and pertinent relationship and therefore that the statute comported with the standards by which legislative classifications must be measured and tested under the Equal Protection Clause. No reasonable and rational relationship exists between the sex classification and any valid legislative objective concerning the appointment of the administrator for an estate.

II.

SECTION 15-314, IDAHO CODE, PERPETUATES AN INVIDIOUS AND UNJUSTIFIABLE DISCRIMINATION AGAINST WOMEN, SOLELY BECAUSE OF THEIR SEX, AND THEREFORE IS INVALID UNDER THE EQUAL PROTECTION CLAUSE.

The Idaho Supreme Court, acknowledging that the 14th Amendment "prohibits classifications which are arbitrary and capricious" (465 P.2d at 637), sought to justify the sex distinction in section 15-314 on three grounds. None of them has merit.

[Footnote 12 continued]

absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection . . . (Emphasis added).

But the *Muller* decision was much narrower than Justice Brewer's words. It upheld the Oregon maximum hours law for women only on the basis of its assumption that the law protected women in a situation where the court found no other protection available and believed that the physical differences between men and women was rationally related, at that time, to the purpose of the statute. See Kanowitz, *Women and the Law*, p. 153-154 (1969).

- A. The argument that the sex classification in section 15-314 serves the purpose of avoiding hearings to determine qualifications of competing applicants for appointment as administrator does not justify the invidious and arbitrary discrimination it perpetrates against women.

The Idaho court pointed out (a) that section 15-312, which classifies the persons entitled to appointment as administrator, is a rational classification because it is based generally on "their relationship to a decedent" and is "in accord with the law as to the intestate succession of property in Idaho";¹³ and (b) that since the court generally appoints only one administrator, "the court is faced with the issue of which one should be named." (465 P.2d at 637-38). The court then stated:

"... By I.C. section 15-314, the legislature eliminated two areas of controversy, *i.e.*, if both a man and a woman of the same class seek letters of administration, the male would be entitled over the female, the same as a relative of the whole blood is entitled over a relative of the same class but of only the half blood. This provision of the statute is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits as to which of the two or more petitioning relatives should be appointed.

"Philosophically it can be argued with some degree of logic that the provisions of I.C. section 15-314 do discriminate against women on the basis of sex. How-

¹³ Although the Idaho court's statement, citing Idaho Code section 14-103 governing succession to property, is generally correct, it is surprisingly incorrect insofar as concerns the specific issue of sex discrimination here involved. Section 14-103 places brothers and sisters in the same class for receiving intestate property, as is generally true in most jurisdictions (23 Am. Jur. 2d 793, "Descent and Distribution", section 48). But section 15-312 discriminates against sisters by putting brothers in class 4 and sisters in class 5. We believe this discrimination is as unjustifiable, and as unconstitutional, as the discrimination perpetrated by the section (15-314) involved in this appeal.

ever nature itself has established the distinction and this statute is not designed to discriminate, but is only designed to alleviate the problem of holding hearings by the court to determine eligibility to administer. This is one of those areas where a choice must be made and the legislature by enacting I.C. section 15-314 made the determination.

"The legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women"

The foregoing rationale not only misapprehends the issue, but is also quite misleading. The fact that the court must make a choice between competing applicants for appointment as administrator, does not *ipso facto* authorize making that choice by an arbitrary and discriminatory classification.

Furthermore, the sex discriminatory classification made in section 15-314 does not go very far "to alleviate the problem of holding hearings by the court to determine eligibility to administer." First, the court must in every case make the determinations required under section 15-317, Idaho Code, which provides:

"15-317. *Disqualifications.*—No person is competent to serve as administrator or administratrix who is:

- "1. Not a bona fide resident of the state;
2. Under the age of majority;
3. Convicted of an infamous crime;
4. Adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence or want of understanding or integrity."

Second, whenever petitions for appointment are filed by two or more persons of the same class, each of whom meets the competency requirements of section 15-317, and they are either all male, or all female, the court must determine which petitioner is better qualified for appointment. Such determinations will in most cases require "holding hearings by the court." The only instance in which the "problem

of holding hearings" is "alleviated" by section 15-314 is where all applicants are clearly competent and female applicants are competing with male applicants. It is apparent that the objective of avoiding hearings which is supposedly sought by section 15-314 is a highly fictional objective, except where its effect is to discriminate against women on the basis of sex. Thus, the discrimination "is defined wholly in terms" of sex—"simply that and nothing more." *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948).

Even if the supposed objective of avoiding hearings provides "some remote administrative benefit to the State," *Carrington v. Rash*, 380 U.S. 89, 96 (1965), such "benefit" does not justify the invidious discrimination it inflicts on women without regard to their qualifications to administer an estate. That supposed objective, indeed, is much more tenuous and farfetched than most of the various kinds of legislative justifications that have been often urged by those defending racially discriminatory statutes and uniformly rejected by this Court. For example:

—*Oyama v. California*, 332 U.S. 633 (1948). The state statute created the presumption that a conveyance of land, financed by an alien father whose Japanese ancestry made him ineligible to hold it and recorded in the name of his citizen son, violates the state law prohibiting ownership of land by aliens. This Court held that such presumption, applicable only to conveyances by persons of Japanese ancestry, violates the Equal Protection Clause despite the asserted need to prevent evasion of State law concerning alien ownership of land.

—*Takahashi v. Fish and Game Comm.*, 334 U.S. 410 (1948). The State statute barred resident aliens of Japanese ancestry, but not other aliens, from working as commercial fishermen. This Court held the statute violates the Equal Protection Clause despite the asserted needs to conserve fish in coastal waters and to protect State citizens engaged in commercial fishing from the competition of Japanese aliens.

—*Buchanan v. Warley*, 245 U.S. 60, 81 (1917). The racial zoning statute violated the Equal Protection Clause despite the asserted need to maintain “purity of the races” and “preservation of the public peace.”

—*Shelton v. Tucker*, 364 U.S. 479 (1960). A statute requiring teachers to file annual affidavits listing all organizational associations violated the 14th Amendment despite the State’s asserted need to inquire into the fitness and competency of state employees.

—*McLaughlin v. Florida*, 379 U.S. 184, 193 (1964). The statute forbidding unmarried interracial couples, but not couples of the same race, from occupying the same room at night violated the Equal Protection Clause despite the State’s asserted need to control illicit extramarital and premarital promiscuity.

—In 1968, this Court ruled that a Louisiana statute which denied a civil cause of action to illegitimate children for the wrongful death of their mother (*Levy v. Louisiana*, 391 U.S. 68), and to a mother for the wrongful death of her illegitimate children (*Gibson v. American Guarantee Co.*, 391 U.S. 73), while allowing such cause of action when the children are legitimate, creates invidious and irrational discrimination which violates the Equal Protection Clause. In both cases, this Court rejected the argument that the statute can be justified on the State’s purpose to “discourage bringing children into the world out of wedlock” and this prevent “sin.” (at pp. 70 and 75).

It has been the consistent practice of this Court, particularly where a statute restricts or discriminates against a person’s constitutional rights rather than simply applying to business classifications, to “weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the” restriction or discrimination. *Schneider v. State*, 308 U.S. 147, 161 (1939); *Thornhill v. Alabama*, 310 U.S. 88, 96 (1940). On such weighing and appraisal, it is plain that the alleged purpose of avoiding a hearing to determine whether a man or a woman is more qualified to

administer an estate does not justify the discrimination against women that is perpetrated by section 15-314, Idaho Code. Could anyone suppose, if section 15-314 had given priority of appointment as administrator to white persons over Negroes, that this Court would uphold the statute because it alleviates the problem of holding hearings to determine their respective qualifications as administrator?

B. The legislative determination that women are less qualified than men to act as administrators is constitutionally insufficient to justify section 15-314.

The Idaho court's statement—that the legislature “evidently concluded that in general men are better qualified to act as an administrator than are women”—instead of shielding the statute against the withering condemnation of the 14th Amendment, simply lays bare the statute's fatal weakness as an “arbitrary and invidious” discrimination which necessarily violates the Equal Protection Clause. This Court has uniformly and repeatedly held that the right to be free from irrational governmentally-imposed discrimination is a “personal” right, not one to be merged with those of all others of the same class and balanced against the claims of those in a different group, where the differences between the groups are not rationally related to the statutory objective. *Henderson v. United States*, 339 U.S. 816, 825-826 (1950); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Mitchell v. United States*, 313 U.S. 80, 97 (1941); *Buchanan v. Warley*, 245 U.S. 60, 80 (1917); *McCabe v. Atchison, T. & S. F. Ry. Co.*, 235 U.S. 151, 161-162 (1914); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938).

Can there be any doubt that this Court would summarily strike down this statute if it had given priority to white persons over Negro persons, even though it is still probable that this country has more white persons than Negroes qualified to act as administrators of estates?

The Idaho Supreme Court admitted that classifying all men as "better qualified to act as an administrator than are [all] women" "may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, [but] we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary." 465 P.2d at 638. That approach to the constitutional guarantee of Equal Protection is a total distortion of the policy manifested in the 14th Amendment. It lumps all women into an inferior class, and deprives them of equality of rights whenever there is competition from a man, notwithstanding the fact that the particular woman who applies for appointment as administrator may be better qualified, and notwithstanding the fact that her sex has absolutely nothing to do with her ability to administer the estate.

Indeed, the Idaho court's rationalization that sec. 15-314 reflects the legislature's concern about who is "better qualified" is simply a fictional after-thought to avoid the searing scrutiny of the Equal Protection clause. *First*, sec. 15-314 does not disqualify a woman when she alone, or other women too, petition for appointment as administratrix. It is only when a male appears that the Idaho court talks about who is "better qualified"—and then it refuses to ascertain whether the particular woman or the particular man applying for appointment is in fact "better qualified". *Second*, sec. 15-312 (to which sec. 15-314 is essentially an appendage) establishes preference classes based on family relationships that are in no way relevant to "qualifications" to administer an estate. *E.g.*, a barely qualified brother or grandchild would be preferred to a highly qualified cousin or creditor. Thus, the whole statutory structure is based on status (and sex discrimination), not legislative concern about who is "better qualified."

But the Idaho Court's statement is not even factually accurate. It is not true that all men, or even most men, are better qualified than women to act as administrator, or that there are only "particular instances" in which women are equally, or better, qualified.

For example, the following data from the *Statistical Abstract of the United States 1970* (91st ed., U.S. Census Bureau) shows that women in this country (and in Idaho) are not as inferior in ability as the Idaho statute assumes:

UNITED STATES

<u>Citation</u>	<u>Date of Data</u>		<u>Men</u>	<u>Women</u>
Table 316 page 213	April, 1970	Persons in civilian labor force, 16 years and over	50,667,000	31,960,000
same	same	Percentage of their sex	75.4	43.2
T. 157, p. 109	1969	Median school years completed by persons 25 years and over	12.1 years	12.1 years
T. 198, p. 131	1968	Bachelors and first professional degrees conferred in 1968	392,830	278,761
T. 555, p. 368	1968	Voters in 1968 elections	38,014,000	40,951,000
T. 684, p. 456	1970	Owners of publicly issued common and preferred stock	15,689,000	15,161,000
T. 509 & 510, p. 333	1962	Persons having \$60,000 or more gross assets	2,538,643	1,594,564
T. 599, p. 400	1969	Federal employees in occupation of:		
		—accounting and budget	59,618	54,803
		—legal and kindred	24,234	21,302

In April, 1970, 4,431,000 women worked in professional and technical jobs and 1,301,000 as managers, officials and proprietors (T. 334, p. 225). In 1969, there were 39,506 women on active military duty, of whom 13,183 held officer rank (T. 386, p. 257). In 1968, there were 27,833 women scientists on the National Register of Scientific and Technical Personnel (T. 808, p. 525).

IDAHO

<u>Citation</u>	<u>Date of Data</u>		<u>Men</u>	<u>Women</u>
T. 186, p. 125	1969	Public high school graduates in 1969	5,924	5,863
T. 196, p. 129	1969	Students enrolled in higher education in Idaho	16,939	10,850

C. The judicial precedents on sex discrimination cited by the Idaho court do not constitutionally justify the discrimination in section 15-314.

The Idaho court cited an anonymous law review Note and seven state court opinions as precedent for the validity of classifications "discriminating on the basis of sex." None of these supports the constitutionality of section 15-314.

(1) *Note*, 2 Stanford L. Rev. 691 (1950) ("Sex Discrimination and the Constitution"). —As the Idaho court correctly stated this Note showed that States have upheld governmental classifications based on sex in a variety of situations. But the court does not mention that the Note pointed out (a) that the Equal Protection Clause requires the state to give equal treatment to all persons unless it has a reasonable basis for differentiation; (b) that to be constitutionally valid a sex-based legislative differentiation must be rationally related to matters in which the sex of the individual is a material factor; and (c) that many sex classifications are invalid (e.g., the Note emphasized, at pp. 724-725, that a sex classification limiting jury service to men "seems as arbitrary as one based on race" since neither sex nor race "has any conceivable connection with the jury function.")

(2) *Craig v. Lane*, 60 Ida. 178, 89 P.2d 1008 (1939). —This case is a striking example of how sex discrimination produced a shocking injustice. Mrs. Craig, a married woman, signed a surety bond to support her son's appeal in his law suit against Lane. Lane moved to dismiss the appeal on the ground that a married woman could not sign a surety agree-

ment except one solely for her benefit or in connection with her separate property. Despite Mrs. Craig's affidavit that the bond was for her benefit and that she intended to be bound thereby, the Idaho court ruled that the bond was defective and dismissed the son's appeal. The court stressed that at "common law a married woman had no right to contract generally," and ruled (at p. 1009) that the Federal constitution "gave a married woman no rights in addition to those she had at the time of its adoption," citing *Minor v. Happersett*, 21 Wall. 162, which held that the 14th Amendment did not entitle women to vote. Thus, in the name of "protection of a married woman's separate property", the court simultaneously denied the woman the right to help her son, and destroyed his right of appeal in a litigated case. The decision is clearly erroneous in holding that married women have no constitutional rights. But even if it were correct, as to married women it is no precedent for the sex discrimination in section 15-314, which does not involve the status of marriage. Cf. Idaho Code, section 15-317, which allows a married woman to be an administratrix.

(3) *State v. Hunter*, 208 Ore. 282, 300 P.2d 455 (1956) — This case upheld the conviction of a woman for violating a state statute prohibiting women (but not men) from "participating in wrestling competition and exhibition". The court did not seek to examine whether there was a factual and rational basis to forbid this activity by women only. Instead, it ruled (p. 457): "It is axiomatic that the Fourteenth Amendment to the U.S. Constitution does not protect those liberties which civilized states regard as properly subject to regulation by penal law." Such negation of the 14th Amendment simply disregarded this Court's numerous decisions applying the Equal Protection Clause (not to mention the Due Process Clause) to penal laws. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967). Indeed, the Oregon court's blindness to sex discrimination is revealed by its cavalier statement, after noting that the legislature which enacted the statute was "predominantly masculine": "Obviously it intended that there

should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman." (at pp. 457-458).

(4) *Patterson v. City of Dallas*, 355 S.W. 2d 838 (Tex. Civ. App. 1962) involved an ordinance prohibiting any person from administering massage to a person of the opposite sex in a massage establishment, but exempted chiropractors, physical therapists and nurses operating under a doctor's direction. On the basis of evidence that there had been many lewd acts committed by operators of massage parlors, and that the ordinance was enacted to curb that evil and contained appropriate exceptions for massages for medical purposes, the court upheld the ordinance as a reasonable effort to protect public health and morals. The ordinance applied to both men and woman alike, and was based on a rational relationship to a legitimate legislative objective. Hence, it in no way supports the irrelevant sex discrimination perpetrated in section 15-314.

(5) In *State v. Hollman*, 232 S. Car. 489, 102 S.E. 2d 873 (1958), a man convicted of criminal assault contended on appeal that women had been excluded from the petit jury. The court held (p. 878) that the point "not having been argued on appeal" is "deemed abandoned," and that it was "devoid of merit" because the exclusion of women from the jury "does not violate the Fourteenth Amendment." The latter dictum is certainly not good law today. See *White v. Crook*, 251 F. Supp. 401, 408 (D.C. Ala. 1966).

(6) *Eskridge v. Div. of Alcoholic Bev. Control*, 30 N.J. Super. 472, 105 A.2d 6 (1954) upheld the conviction of a bartender for violating an ordinance prohibiting service of liquor to women over a bar except when seated at tables. The court held (p. 8) that the state's power over sale of intoxicating beverages "is plenary. 'It is a subject by itself, to the treatment of which all the analogies of the law appropriate to other topics cannot be applied.' " However, the Idaho Supreme Court cited the *Eskridge* decision without mentioning that fifteen years later the New Jersey courts virtually overturned it, holding that such ordinance is "an

unreasonable exercise of the police power" and therefore could not validly "limit the rights of women." *Gallegher v. City of Bayonne*, 106 N.J. Super. 401, 256 A.2d 61, 62-63 (1969), *aff'd per curiam*, 55 N.J. 159, 259 A.2d 912 (1969); see also *Paterson Tavern & Grill Owners Assn. v. Borough of Hawthorne*, ftnt. 11, *supra*. In any event, even if we assume that the regulation of liquor sales is unrestricted by constitutional limitations of equal protection (Cf. *Goesaert v. Cleary*, *supra*, and *Seidenberg v. Old McSorleys' Ale House*, *supra*), it is plain that the *Eskridge* case in no way supports sex discrimination in appointing the administrator of an estate.

(7) *State v. Emery*, 224 N. Car. 581, 31 S.E. 2d 858 (1944). This decision (2 judges dissenting) upset a man's conviction by a jury composed of 10 men and 2 women, on the ground that the state constitution referred to juries of "good and lawful men" and thus made women ineligible for jury service. This decision would not be good law today. *White v. Crook*, *supra*, p. 14.

(8) *In re Mahaffay's Estate*, 79 Mont. 10, 254 Pac. 875 (1927). This decision ruled that a State statute limiting the power of a married woman to dispose by will of more than 2/3 of her estate without her husband's consent was neither superseded by the married women's statutes nor invalidated by the 14th Amendment, even though the husband could make such a testamentary disposition without his wife's consent. The court held (a) that the legislature has unlimited power to condition the right of testamentary disposition and (b) that the "essential differences which have always been recognized between a married man and a married woman" in connection with disposition of property have been "so long acquiesced in . . . that we must presume it is based upon such substantial differences and conditions as to make it natural and reasonable." (pp. 878-879). As to holding (a), compare *In re Estate of Legatos*, p. 14, *supra*. As to holding (b) ("it-has-always-been-that-way"), this Court stated in *Levy v. Louisiana*, 391 U.S. 68, 71 (1968): "However that might be, we have been extremely

sensitive to basic civil rights . . . and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. *Brown v. Board of Education*, 347 U.S. 483; *Harper v. Virginia Board of Elections*, 383 U.S. 663, at 669." See also *Moragne v. State Marine Lines*, 398 U.S. 375 (1970) which overturned an ancient doctrine barring suits under general maritime law for wrongful death caused by violation of maritime duties because it "had little justification except in primitive English legal history" (at p. 379); and *Loving v. Virginia*, 388 U.S. 1 (1967) which held miscegenation laws unconstitutional even though they had been long established, and adhered to with emotional fervor, in at least 30 states.

CONCLUSION

The Idaho Supreme Court's decision in this case simply echoes the obsolete Bradley-Field-Swayne philosophy about the inferiority of women, a philosophy that no longer has vitality under the Equal Protection Clause. The irrational and irrelevant sex discrimination imposed by sections 15-312 and 15-314 is plainly unconstitutional. The decision of the Idaho Supreme Court should be reversed, so that the probate court can determine which of the applicants "is best qualified to serve as administrator or administratrix of the estate."

Respectfully submitted,

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**NOW LEGAL DEFENSE AND EDUCATION
FUND, INC.**

April 14, 1971

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1970

70-4

No. ~~130~~

Supreme Court, U.S.
FILED

JUN 25 1971

E. ROBERT SEEVER, CLERK

SALLY M. REED,

Appellant,

v.

CECIL R. REED, Administrator In the Matter of the
Estate of Richard Lynn Reed, Deceased,

Appellee.

**BRIEF OF THE CITY OF NEW YORK,
AMICUS CURIAE**

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IN THE
Supreme Court of the United States
October Term, 1970

No. 430

SALLY M. REED,

Appellant,

v.

CECIL R. REED, Administrator In the Matter of the
Estate of Richard Lynn Reed, Deceased,

Appellee.

**BRIEF OF THE CITY OF NEW YORK,
AMICUS CURIAE**

Statement of the Case

In this appeal from a decision of the Supreme Court of Idaho, appellant Sally M. Reed, mother of an intestate, challenges the federal constitutionality of a state statute under which appellee, intestate's father, was automatically appointed administrator of the estate to her exclusion.

The relevant statutory provisions are as follows:

Idaho Code, §15-312:

“Administration of the estate of a person dying intestate must be granted to some one or more of the person hereinafter mentioned, and they are respectfully entitled thereto in the following order:

1. The surviving husband or wife * * *
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.”

* * *

Idaho Code, §15-314:

“Of several persons claiming and equally entitled to administer, males must be preferred over females; and relatives of the whole to those of the half blood.”

Section 15-314 is challenged on the ground that it denies to appellant, a woman, the equal protection of the laws in that it creates an unwarranted classification based on sex which results in her detriment.

Issues Presented

1. Is the challenged statute which favors men over women in the matter of granting of letters of administration unconstitutional as in violation of the Equal Protection Clause of the Fourteenth Amendment, in that it erects an irrational classification?

Amicus urges that the above question should be answered in the affirmative. Should it be found, however, that some rational basis may exist for the classification erected in the challenged statute, *amicus* urges this Court to consider the following issue:

2. Is the challenged statute unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment in that it contains a classification which is suspect because it discriminates against women and the state did not show that the discrimination is necessary to the accomplishment of a legitimate legislative objective?

Amicus urges that this question be answered in the affirmative.

Interest of the *Amicus Curiae*

Amicus, the City of New York, in the recognition that "prejudice, intolerance, bigotry, and discrimination and disorder occasioned thereby threaten the rights and proper privileges of [the City's] * * * inhabitants and menace the institutions and foundation of a free democratic state," has established the City Commission on Human Rights, empowered to eliminate and prevent discrimination in employment, public accommodation, amusement, housing and commercial space. New York City Administrative Code, Ch. I, Title B. The Commission is the recourse of all of New York City's citizens aggrieved by discrimination in each of these areas.

Each year, through the Commission, the City receives scores of complaints from women who have been victims of discrimination because of their sex. Complaints include fail-

ure of employers to hire women who are as well or better qualified for jobs than the men who are hired; being hired into special categories of "women's jobs" which generally pay less, carry less responsibility and provide less opportunity for advancement than jobs allocated by the employer to men; disparity of pay; forced maternity leave or failure of employers to allow maternity leave; denial of fair and equal opportunity for promotion and for access to company training programs; firing of women for assertion of their rights; exclusion of women from bars or restaurants or certain areas thereof unless in the company of men; inability to obtain loans or commodity trading accounts without the husband's signature; and refusal to issue insurance policies, among others.

It is the experience of the City of New York that the absence of an express finding by this Court invalidating statutes which embody invidious discriminations based on sex, hinders its efforts in enforcing its anti-discrimination law to adequately fulfill its obligation to women. A clear statement by this Court that constitutional protection shall not be denied to more than one-half of our citizens is necessary to insure a more wide-spread recognition of and compliance with the New York City anti-discrimination statute than is the case without a clear national mandate.

Amicus' daily contact with the problems such discrimination creates and the commitment of this City to securing the welfare of all of New York City's inhabitants, have prompted this brief.

POINT I

Statutes, such as the one in question, containing classifications which discriminate against women on the basis of their sex, where arbitrary, irrational and unfounded in fact, deny to women equal protection of the law.

(1)

The Idaho Supreme Court recognized that "it can be argued with some degree of logic that the provisions of I[daho] C[ode] §15-314 do discriminate against women on the basis of sex." *Reed v. Reed*, 93 Idaho 511, 465 P. 2d 635 (1970), at p. 638.

However, the Court concluded that the legislature in enacting the statute "evidently concluded that in general men are better qualified to act as an administrator [*sic*] than are women." The Court below also concluded that the assumed legislative objective of the statute, to alleviate the problem of holding hearings by the Court to determine eligibility to administer, was properly served by the classification. 465 P.2d 635 at p. 638.

It is respectfully submitted that the presumption that women are less qualified to administer estates than men is unfounded in fact and that the classification based on the presumption is therefore irrational, arbitrary and capricious. The presumption is completely refuted by statistics indicating that women are for the most part as well educated as men and have entered as fully into the business life of their respective communities as has been permitted.

The 1969 *Handbook on Women Workers*, published by the United States Department of Labor, Women's Bureau, Bulletin 294, Wages and Labor Standards Administration, United States Department of Labor (1969) (hereinafter "Handbook"), shows that over 29 million women or 42% of all women of working age do in fact work. *Handbook*, pp. 9-10. Women constitute 37% of the labor force. *Handbook*, p. 15. Many of these women work as the sole support of their families or to provide needed second incomes, and manage to do so despite the fact that they have children and few child care centers are yet available. In 1967, 11% of the families in the United States had a woman at the head of the family. *Handbook*, p. 28. Thirty-eight percent of all women workers or 10.6 million working women have children under eighteen years of age. *Handbook*, p. 37.

Of the women in the labor force in 1968, over 18.5 million or 67% had at least a high school education. *Handbook*, p. 178. Thirty-eight percent of all women in the population in 1968 as compared with 30.6% of all men completed all four years of high school. According to a survey made in 1968, of all persons over 18 years of age in the general population, 5.7% of the women and 6.9% of the men were college graduates. *Handbook*, p. 178.

This substantial number of women achieving a high level of schooling contributes significantly to the profile of types of jobs they hold. Of all professional and technical workers employed in 1968, 38.6% were women and of all managers, officials and proprietors in that period, 15.7% were women. *Handbook*, p. 92. In 1968, three-fifths of all employed women, as compared to two-fifths of all employed

men, were working in "white collar jobs"; *Handbook*, pp. 87-88, although many undoubtedly work below their qualifications because of widespread job discrimination.

In sum, women, for the most part, are as well educated as men and comprise almost half of the nation's labor force. Women hold a large proportion of white collar jobs. A substantial number of women are heads of households and an even greater number of women who are mothers may be working to earn the second income in their families. It can no longer be said, then that, a woman's place is exclusively in the home. Even when women are wives and mothers, they enter the labor force in large numbers and in responsible positions, working with men to support themselves and their families.

(2)

Moreover, the legislative objective cited by the court below of avoiding hearings as to the relative merits of relations petitioning for letters of administration does not justify the discrimination here present. Hearings are still necessary to determine the relative merits of siblings or other relatives of the same sex who show equal right to the letters. Only the sex distinction is selected by the legislature in its race toward efficiency. Factors such as age, education, and experience in business affairs are ignored. It would therefore appear from the face of the statute that in fact, its object is not efficiency, but rather invidious discrimination against women.

Under traditional equal protection principles, this statute must fall. The cases hold that while a state has broad power to make classifications, it may not draw a line which constitutes an invidious discrimination against

a particular class. "Though the test has been variously stated, the end result is whether the line drawn is a rational one." *Levy v. Louisiana*, 391 U.S. 68 (1968) at p. 71; *Ferguson v. Skrupa*, 372 U.S. 726 (1963) at p. 732; *Skinner v. Oklahoma*, 316 U.S. 535 (1942) at p. 541-542; *Morey v. Doud*, 354 U.S. 457 (1957).

As shown above, the statute here in question has no rational basis. The case is analogous in this regard to *Seidenberg v. McSorley's Old Ale House, Inc.*, 317 F. Supp. 593 (1970) where exclusion of women from a licensed premises constituted an invidious discrimination.

POINT II

The challenged statute violates the Equal Protection Clause of the Fourteenth Amendment in that it contains a classification which is suspect because it discriminates against women and the state did not show that the discrimination is necessary to the accomplishment of a legitimate legislative objective.

(1)

Amicus urges that a statute which erects a classification based on sex and whose effect is detrimental to women be treated as suspect, by analogy to cases dealing with racial discrimination, and that the burden of proving the rationality of the classification and its necessary relation to a legitimate legislative objective rest upon the proponent of the legislation. See *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Oyama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish and Game Comm.*, 334 U.S. 410 (1948); *Korematsu v. United*

States, 323 U.S. 214 (1944); *Griffin v. Illinois*, 351 U.S. 12 (1955).

This treatment is urged because, while historically, discrimination against women like that against blacks has been condoned, we are emerging into an era when more rigorous adherence to equal protection principles by this Court as well as the changed place of women in American society requires fresh justification, if such can be made, of invidious distinctions now recognized as specious. Compare *Plessy v. Ferguson*, 163 U.S. 537 (1895) with *Brown v. Bd. of Ed.*, 349 U.S. 294 (1954).

Early decisions upholding classifications based on sex (although equal protection grounds were not always considered) rest almost entirely on "judicial cognizance of all matters of general knowledge." *Muller v. Oregon*, 208 U.S. 412 (1908) at p. 421. The Court there was candid in its acceptance without proof of the proposition that a woman's physical structure and the functions she performs justified protection as to the number of hours worked. Yet *Muller* has had numerous progeny, all of which have uncritically accepted the assumptions made therein, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Ward v. Luttrell*, 292 F. Supp. 162 (D.C., E.D. La., 1968); *Hoyt v. Florida*, 368 U.S. 57 (1961).

In *Muller*, the Court was not directly reviewing a statute challenged as a violation of women's rights but rather was considering a due process challenge to an economic regulation which set maximum working hours for women. In 1905, it must be remembered, the Supreme Court had held that maximum hours legislation violated the "freedom of

contract" of employers and employees which the Court felt was embodied in the "liberty" protected by the Fourteenth Amendment's Due Process Clause. *Lochner v. New York*, 198 U.S. 45 (1905). Viewed in this light, *Muller's* reliance on the special status of women was clearly designed to distinguish the line of cases, such as *Lochner*, which had invalidated similar state economic regulation.

Muller is important here because it has been interpreted to restrict women, their role and capacities, whereas *Muller* was obviously intended by the Court to serve a very different purpose—the sustaining of limited economic regulation against the claim that such regulation, whether applied to men or women, violated the Fourteenth Amendment.

In light of our current state of knowledge concerning the status and capacities of women, the facts relied on by the Court in *Muller* would be difficult to sustain. For example, the Court stated, "The legislation and opinions [in Mr. Brandeis' submission] * * * are significant of a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation" governing her working hours. (Emphasis added.) *Muller v. Oregon, supra* at 420. Reports of committees of statisticians, hygienists, and factory inspectors, among others, were adduced to the effect that women should be protected against working long hours " * * * primarily because of their special physical organization." The Court, combining evidence about physical fact with assumptions about woman's role, found that the physical characteristics of women, their "maternal functions", "the rearing and education of the children", and "the maintenance of the

home" all prove the necessity of the protective labor law. *Muller v. Oregon*, *supra* at 420, n.1.

It must be emphasized; however, that *Muller* considered only the question of whether maximum hour laws for women violated employer's rights to contract with employees. It cannot be controlling on the manifestly different question of whether classifications based on sex can withstand judicial scrutiny under the Equal Protection Clause. That issue was not considered by the *Muller* Court.

Moreover, even if there were adequate proof in *Muller* to sustain the law on the basis of women's physical characteristics, all would agree that the "special physical organization of women" is not related to their appointment to administer estates, their admissibility to places of public accommodation, their ability to rent housing, to execute contracts, to hold property in their own names. Yet opinions in cases involving these issues and numerous others regarding the rights of women flow from decisions such as *Muller*.

The reliance on popular notions about women was nowhere more evident than in *Goesaert v. Cleary*, 335 U.S. 464 (1948). Without any citation of evidence of scholarly authority, the Court stated, "Michigan could, beyond question, forbid all women from working behind a bar. This is so despite the vast changes in the social and legal position of women." *Goesaert v. Cleary*, *supra* at 465-466. The alteration in the role and status of women was likewise acknowledged *ipse dixit* but the Court, in the face of that "finding", maintained that the state was not precluded from "drawing a sharp line between the sexes, certainly

- in such matters as the regulation of the liquor traffic." *Goesaert v. Cleary*, *supra* at 466.

Surely the time has come for the Court to re-examine the reasoning upon which their opinions have been premised. Whether the fundamental error in perception of women's status in society stems from a desire to protect her supposed fragile sensibilities or merely from the "selfish" desire to secure some "island on the sea of life reserved for man that would be impregnable to the assault of woman," *State v. Hunter*, 300 P.2d 455 (1956) at p. 457, this Court should now refuse to judicially notice as general knowledge, that which has never been proven true.

(2)

While the Court has never precisely articulated the basis for determining that certain classifications are, by their nature, suspect, the elements of that determination emerge from the cases and are applicable here. Simply stated, a classification is suspect:

- a. where such classification is pervasively used in many statutes and laws touching on myriad and diverse subjects;
- b. where it is justified upon a series of presumptions about the class distinguished which are borne along by prejudice rather than fact; and
- c. where it does not reflect merely special treatment for the class in a given instance but rather causes a stigma to attach to its bearer.

At the outset, it should be noted what a suspect classification is not. It is not simply and exclusively a classifica-

tion based upon race. To attempt to characterize the Court's past suspect classification rulings as growing directly out of the specific history of the Civil War Amendments is blinking reality. That line of cases does indeed include a series of decisions relating to the rights of black Americans, *Loving v. Virginia*, 388 U.S. 1 (1967), *McLaughlin v. Florida*, 379 U.S. 184 (1964), but other suspect classifications touch upon rights of those not remotely connected with the Civil War and the Thirteenth, Fourteenth and Fifteenth Amendments. The war between the States was not fought over the rights of aliens or Japanese ineligible for citizenship. And yet these persons too have come within the protection of the suspect classification doctrine. *Oyama v. California*, 332 U.S. 633 (1948); *Takahashi v. Fish & Game Comm'n.*, 334 U.S. 410 (1948); *Korematsu v. United States*, *supra*; *Griffin v. Illinois*, 351 U.S. 12 (1955). Nor, as stated above, is a classification suspect when it is beneficial. *Prima facie*, a statute which grants benefits to women cannot be considered to discriminate against them.

a. Invidious sexual classifications, like racial ones, appear in statutes relating to a great diversity of civil and criminal rights. Women, like blacks, have been disabled in the owning or rental of property (compare *Jones v. Mayer*, 392 U.S. 409 (1968) with California Codes, Vol. 6, Civil Codes, §161a, *et seq.* (1954)), in the use and enjoyment of public accommodations (compare *Katzenbach v. McClung*, 379 U.S. 294 (1964) with *Seidenberg v. McSorleys' Old Ale House*, 317 F. Supp. 593 (1970)), in bringing suits in court to vindicate their rights (compare *Dred Scott v. Sanford*, 60 U.S. 393 (1856) with California Codes, Vol. 6, Civil Codes §164 (1954)), in entering into valid contracts

(compare *Civil Rights Cases*, 109 U.S. 3, 35 (1882), Harlan, J., dissenting, with *Austin v. United Credits Corp.*, 269 S.W. 2d 793 (1954). Women, as were blacks, have been barred from attending public education facilities. Compare *Brown v. Board of Education*, 347 U.S. 483 (1954) with *Heston v. Bristol*, 317 S.W. 2d 86 (1958), appeal dismissed, 359 U.S. 230 (1959). Women, as were blacks, have been made to suffer different and harsher criminal penalties than men (or Caucasians). Compare *McLaughlin v. Florida*, 379 U.S. 184 (1964) with *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (1968). The list of State and local laws which contain sexual classifications is staggering. See, generally, L. Kanowitz, *Women and the Law: The Unfinished Revolution* (1969). The examples cited should suffice to reflect the many and varied areas of life in which sex-based classifications affect rights, privileges and immunities of female citizens.

One particularly suspect aspect of invidious sex-based classifications, like racial classifications, is that they do affect such varied rights. Can it be true that inherent traits of femaleness are rationally related to owning property, entering restaurants, receiving an education and serving criminal penalties? To ask the question is to answer it, and this alone should satisfy the Court that invidious sex-based classifications are so pervasive in society as to be viewed as suspect.

b. The only functional, primary description afforded by a sexual classification pertains to physical, biological functions. The presumption that women are inept, uneducated, naive, insulated from civic life and civic affairs,

in need of the protective custody of husbands or otherwise socially incapacitated, is simply not provable by a simple equation with their being female. Hence a rule which is intended to distinguish between those competent and incompetent to administer an estate cannot presume that "competent equals male" and "incompetent equals female" unless competency is a function related to male but not female biology.

In the instant matter, the legislature appears to be seeking business acumen obtained through education and/or business experience. If business acumen is the goal and work or education are the criteria, the legislature should so state. To be sure, an argument could be made that even education and/or business experience are not necessarily "primary" ability classifications, and that those standards, too, contain presumptions which may be unfounded in relation to business acumen.

However, the limits of too flexible a classification rule are those imposed by due process. Consonant with flexibility, a classification must be described with sufficient particularity as to avoid attack for vagueness. Certain "classifications are impermissible because they bear no intelligible proper relation to the consequences that are made to flow from them." Harlan, J., dissenting in *Levy v. Louisiana*, 391 U.S. 68, 81 (1968). And because the consequences which flow from sex-based classifications bear no intelligible or proper relation to legitimate legislative objectives such classifications should be ruled suspect in the context of the Fourteenth Amendment.

c. The erroneous assumptions about women which support sex-based invidious classifications range from patronizing to humiliating and, in their effect, cause a stigma to be attached to the female's status in society. See "Developments in the Law—Equal Protection", 82 Harv. L. Rev. 1065, 1127, *et seq.* (1969). Though the black man was called an "inferior" being, *Dred Scott v. Sanford*, 60 U.S. 393, 405 (1856), and the female merely the "weaker" one, the net effect of sexual, like racial classifications is the same: the distinguished class is burdened with a whole range of disabilities imposed not through inherent ability limitations but rather through the pressure of societal prejudice.

The Court, in *Hirabayashi v. United States*, *supra*, stated that a free people with institutions founded on equality should not tolerate invidious distinctions such as were there held unconstitutional. No less invidious are distinctions based on sex. No less should they be viewed as "inherently suspect." *Kramer v. Union Free School District*, *supra* at 628, n.9.

Where the Court is reviewing a suspect classification, "the statute must be subjected to an exacting scrutiny * * *." *Kramer v. Union Free School District*, *supra* at 628, n.9; *Korematsu v. United States*, *supra* at 216; *Takahashi v. Fish & Game Comm'n*, *supra* at 420; *Oyama v. California*, *supra* at 640. The focus of the inquiry is not, then, whether there is any rational basis for the classification, but rather whether "some overriding statutory purpose" requires the discrimination. *McLaughlin v. Florida*, *supra* at 192; *Loving v. Virginia*, *supra* at 11; *Truax v.*

Raich, 239 U.S. 33 (1915), at p. 43. Without such a justification, the "classification * * * is reduced to an invidious discrimination forbidden by the Equal Protection Clause." *McLaughlin v. Florida*, *supra* at 192-193.

CONCLUSION

The judgment appealed from should be reversed.

June 24, 1971.

Respectfully submitted,

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IN THE

Supreme Court of the United States

PORT SEAVER, CLERK

OCTOBER TERM 1970

No. ~~100~~

70-4

SALLY M. REED,

Appellant,

—v.—

CECIL R. REED, Administrator, In the Matter of the
Estate of Richard Lynn Reed, Deceased.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IDAHO

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Estate of Richard Lynn Reed, Deceased.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IDAHO

BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Court of the State of Idaho is reported at 93 Idaho 511, 465 P.2d 635. The opinion of the District Court, Fourth Judicial District, is unreported. Copies of the opinions are set out in the separate Appendix, pp. 12a, 17a.¹

¹ References to the separate Appendix are hereafter designated by the symbol "A."

Jurisdiction

The judgment of the Supreme Court of the State of Idaho was entered on February 11, 1970. A timely petition for rehearing was denied on March 24, 1970. Notice of Appeal to the Supreme Court of the United States was filed in the Supreme Court of the State of Idaho on June 16, 1970 (A. 25a). On June 24, 1970, Mr. Justice Douglas granted a timely application to extend appellant's time to file her jurisdictional statement to and including July 22, 1970. The Jurisdictional Statement was filed July 21, 1970, and probable jurisdiction was noted March 1, 1971.

The jurisdiction of the Supreme Court to review this decision on appeal is conferred by Title 28 U.S.C., Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *In re Gault*, 387 U.S. 1 (1967); *Loving v. Virginia*, 388 U.S. 1 (1967); *Levy v. Louisiana*, 391 U.S. 68 (1968).

Statutes Involved

Idaho Code, Sec. 15-312 provides:

Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
2. The children.

3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.
7. The next of kin entitled to share in the distribution of the estate.
8. Any of the kindred.
9. The public administrator.
10. The creditors of such person at the time of death.
11. Any person legally competent.

If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate.

Idaho Code, Sec. 15-314 provides:

Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of the whole to those of the half blood.

Question Presented

Whether Idaho Code, Sec. 15-314, which provides that as between persons equally entitled to administer an estate, males must be preferred to females, denies appellant, a woman, the equal protection of the laws.

Statement of the Case²

Richard Lynn Reed, the adopted son of appellant, Sally M. Reed, and appellee, Cecil R. Reed, died intestate on March 29, 1967, in Ada County. According to the respective petitions of his mother, Sally M. Reed, and of his father, Cecil R. Reed, his parents were his only heirs at law.

Sally M. Reed, the appellant, as the decedent's mother, filed her petition for probate of his estate on November 6, 1967. Prior to the time set for the hearing on this petition Cecil R. Reed, the father, also petitioned for letters of administration.

The cause was heard on the petitions for administration of the respective parties, and the probate court entered its order appointing appellee, Mr. Reed. The probate court in entering its order noted that each of the parties was equally entitled to letters of administration under I.C. §15-312, but that Mr. Reed was entitled to a preference by reason of I.C. §15-314, which provides that as between persons equally entitled to administer an estate, males must be preferred to females.

On April 23, 1968, Mrs. Reed appealed to the district court contending that I.C. §15-314 is unconstitutional as a violation of the Idaho Civil Rights Act (I.C. §18-7301 et seq.), the Fourteenth Amendment of the United States Constitution and Art. 1, §1 of the Idaho Constitution. The district court reversed the order of the probate court on

² The Statement of the Case is taken verbatim from the opinion of the Supreme Court of Idaho, except for the elimination of one sentence not relevant here, and for minor modifications necessary to properly identify the parties.

the ground that I.C. §15-314 violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and returned the case to the probate court for a determination, disregarding the preference set out by I.C. §15-314, of who is entitled to the letters of administration. Mr. Reed appealed to the Supreme Court of Idaho contending that the district court erred in holding I.C. §15-314 unconstitutional. The Idaho Supreme Court, reversing the district court, held I.C. Section 15-314 constitutional.

Summary of Argument

I

Idaho Code, Sec. 15-314, which provides that as between persons "equally entitled to administer [a decedent's estate], males must be preferred to females," denies appellant, an "equally entitled" woman, the equal protection of the laws.

The sex line drawn by Sec. 15-314, mandating subordination of women to men without regard to individual capacity, creates a "suspect classification" requiring close judicial scrutiny. Although the legislature may distinguish between individuals on the basis of their need or ability, it is presumptively impermissible to distinguish on the basis of an unalterable identifying trait over which the individual has no control and for which he or she should not be disadvantaged by the law. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference.

The distance to equal opportunity for women in the United States remains considerable in face of the pervasive social, cultural and legal roots of sex-based discrimination. As other groups that have been assisted toward full equality before the law via the "suspect classification" doctrine, women are sparsely represented in legislative and policy-making chambers and lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally. Absent firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.

Prior decisions of this Court have contributed to the separate and unequal status of women in the United States. But the national conscience has been awakened to the sometimes subtle assignment of inferior status to women by the dominant male culture. In very recent years, both federal and state courts have expressed sharp criticism of lines drawn or sanctioned by governmental authority on the basis of sex. With some notable exceptions, for example, the case at bar, these lines have not survived judicial scrutiny. The time is ripe for this Court to repudiate the premise that, with minimal justification, the legislature may draw "a sharp line between the sexes," just as this Court has repudiated once settled law that differential treatment of the races is constitutionally permissible. At the very least the Court should reverse the presumption of rationality when sex-based discrimination is implicated and, rather than requiring the party attacking a statute to show that the classification is irrational, should require the statute's proponent to prove it rational.

Biological differences between the sexes bear no relationship to the duties performed by an administrator. Idaho's interest in administrative convenience, served by excluding women who would compete with men for appointment as an administrator, falls far short of a compelling state interest when appraised in light of the interest of the class against which the statute discriminates—an interest in treatment by the law as full human personalities. If sex is a "suspect classification," a state interest in avoiding a hearing cannot justify rank discrimination against a person solely on the ground that she is a female.

II

The sex line drawn by sec. 15-314, arbitrarily ranking the woman as inferior to the man by directing that the probate court take no account of the respective qualifications of the individuals involved, lacks a fair and substantial relation to a permissible legislative purpose. The judgment that "in general men are better qualified to act as an administrator than are women" rests on totally unfounded assumptions of differences in mental capacity or experience relevant to the office of administrator. To eliminate a woman who shares an eligibility category with a man when there is no basis in fact to assume that women are less competent to administer than are men, is patently unreasonable and constitutionally impermissible.

ARGUMENT

Introduction

By the explicit terms of Sec. 15-314 of the Idaho Code, appellant was denied the right to qualify as the administrator of her son's estate solely because of her sex. The issue in this case is whether, as appellant contends, mandatory disqualification of a woman for appointment as an administrator, whenever a man "equally entitled to administer" applies for appointment, constitutes arbitrary and unequal treatment proscribed by the fourteenth amendment to the United States Constitution.

In determining whether a state statute establishes a classification violative of the fourteenth amendment guarantee that those similarly situated shall be similarly treated, this Court has developed two standards of review. See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969).

In the generality of cases a test of reasonable classification has been applied: Does the classification established by the legislature bear a reasonable and just relation to the permissible objective of the legislation? Under this general test, if the purpose of the statute is a permissible one and if the statutory classification bears the required fair relationship to that purpose, the constitutional mandate will be held satisfied. *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) ("But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.")

In two circumstances, however, a more stringent test is applied. When the legislative product affects "fundamental rights or interests," e.g., *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667, 670 (1966) (poll tax in state elections), or when the statute classifies on a basis "inherently suspect," this Court will subject the legislation to "the most rigid scrutiny."³ Thus, a statute distinguishing on the basis of race or ancestry embodies a "suspect" or "invidious" classification and, unless supported by the most compelling affirmative justification, will not pass constitutional muster. *Graham v. Richardson*, — U.S. — (June 14, 1971); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948).

It is appellant's principal position that the sex line drawn by Sec. 15-314 of the Idaho Code, mandating subordination of women to men without regard to individual capacity, creates a "suspect classification" for which no compelling justification can be shown. It is appellant's alternate position that, without regard to the suspect or invidious nature of the classification, the line drawn by the Idaho legislature, arbitrarily ranking the woman as inferior to the man

³ *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Although the first case to develop the concept that classifications based on race are "suspect", *Korematsu* justified the detention of men and women solely because of their Japanese ancestry, on the basis of an espionage threat, when imminent foreign invasion was feared. With the glaring exception of *Korematsu*, "suspect" classifications have not survived this Court's rigid scrutiny. In retrospect, the extreme personal deprivation countenanced wholesale in *Korematsu* is recognized generally as having been grossly disproportionate to the national security interest at stake. See A. Girdner & A. Loftis, *The Great Betrayal: The Evacuation of Japanese-Americans during World War II* 16-32 (1969); B. Hosokawa, *Nisei: The Quiet Americans* 292-98 (1969).

by directing the probate court to take no account of the respective qualifications of the individuals involved, lacks the constitutionally required fair and reasonable relation to any legitimate state interest in providing for the efficient administration of decedents' estates.

In very recent years, a new appreciation of women's place has been generated in the United States.⁴ Activated by feminists of both sexes, courts and legislatures have begun to recognize the claim of women to full membership in the class "persons" entitled to due process guarantees of life and liberty and the equal protection of the laws. But the distance to equal opportunity for women—in the face of the pervasive social, cultural and legal roots of sex-based discrimination⁵—remains considerable. In the absence of a firm constitutional foundation for equal treatment of men and women by the law, women seeking to be judged on their individual merits will continue to encounter law-sanctioned obstacles.

⁴ See, e.g., American Women, Report of the President's Commission on the Status of Women, and seven accompanying committee reports (1963); American Women 1963-1968, Report of the Interdepartmental Committee on the Status of Women, and four accompanying Task Force Reports of the Citizens' Advisory Council (1968); Kanowitz, *Women and the Law: The Unfinished Revolution* (1969); *A Matter of Simple Justice*, Report of President's Task Force on Women's Rights and Responsibilities (1970); P. Murray, *The Rights of Women*, in N. Dorsen ed., *The Rights of Americans: What They Are—What They Should Be* 521 (1971).

⁵ In 1942, an incisive appraisal of the situation of women in the United States was made by the Swedish sociologist, Gunnar Myrdal, whose study was a source this Court relied on for information concerning race relations in *Brown v. Board of Education*, 347 U.S. 483, 494-95 n. 11 (1954). G. Myrdal, *An American Dilemma* 1073-78 (20th anniv. ed. 1962).

Currently, federal and state measures are beginning to offer relief from discriminatory employment practices.⁶ Principal measures on the national level are the Equal Pay Act of 1963,⁷ Title VII of the Civil Rights Act of 1964,⁸ and Executive Orders designed to eliminate discrimination against women in federal jobs and jobs under federal contracts.⁹ These developments promise some protection of the equal right of men and women to pursue the employment for which individual talent and capacity best equip them. But important as these federal measures are, their coverage is limited. Even in the employment area they cover only a small percentage of the nation's employers and less than half of the labor force.¹⁰ They provide no

⁶ See generally 1969 Handbook on Women Workers, Women's Bureau Bulletin 294, Dept. of Labor [hereinafter Handbook].

It has long been the case that sex bias takes a greater economic toll than racial bias. For example, in 1966, the median wage or salary income of year-round, full-time workers was \$7164 for white men, \$4528 for nonwhite men, \$4152 for white women, and \$2949 for nonwhite women. Handbook at 137. In 1968 the median earnings of fully employed men workers were \$7664; for fully employed women workers, median earnings were \$4457. Background Facts on Women Workers in the United States, Women's Bureau, Dept. of Labor 4 (1970).

⁷ 29 U.S.C. §206(d) (1964); see T. Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U. Cin. L. Rev. 615 (1970).

⁸ 42 U.S.C. §2000e (1964); see Developments in the Law—Title VII, 84 Harv. L. Rev. 1109, 1166-95 (1971); T. Barnard, The Conflict Between State Protective Legislation and Federal Laws Prohibiting Sex Discrimination: Is It Resolved, 17 Wayne L. Rev. 25 (1971).

⁹ Executive Order No. 11246, as amended by Executive Order No. 11375, 3 CFR 320 (Supp. 1967) (applicable to jobs under federal contracts); Executive Order 11478 (applicable to employment in the federal government).

¹⁰ Equal Pay Act coverage is limited to employees covered by the minimum wage provisions of the Fair Labor Standards Act. Gov-

assistance at all in the many areas apart from employment, as in the case at bar for example, where women are relegated to second class status.

The experience of trying to root out racial discrimination in the United States has demonstrated that even when the arsenal of legislative and judicial remedies is well stocked, social and cultural institutions shaped by centuries of law-sanctioned bias do not crumble under the weight of legal pronouncements proscribing discrimination. Thus, just as the Equal Pay Act and Title VII have not ended discrimination against women even in the employment spheres to which they apply, sex-based discrimination will not disintegrate upon this Court's recognition that sex is a suspect classification. But without this recognition, the struggle for an end to sex-based discrimination will extend well beyond the current period in time, a period in which any functional justification for difference in treatment has ceased to exist.

Very recent history has taught us that, where racial discrimination is concerned, this Court's refusal in *Plessy v. Ferguson*, 163 U.S. 537 (1896), to declare the practice unconstitutional, reinforced the institutional and political

ernment (federal, state, local) employees, executive, administrative and professional persons, teachers, most domestic and migrant workers are not covered. Many of the exempt industries and positions are heavily populated with female workers. See T. Murphy, *supra*, 39 U. Cin. L. Rev. at 619-20. Title VII excludes employers of 24 or fewer employees, private membership clubs, educational institutions and federal, state and local governments. It has been estimated that 92% of all employers, and 60% of all employees are excluded from Title VII coverage. See E. R. Larsen, 42 U.S.C. Section 1981 as a Remedy for Racial Discrimination in Employment, 4 Clearinghouse Review 572, 573 (1971) (percentages based on Department of Labor statistics).

foundations of racism, made it more difficult eventually to extirpate, and postponed for fifty-eight years the inevitable inauguration of a national commitment to abolish racial discrimination.

As an example of the slow awakening of the national conscience to the more subtle assignment of inferior status to women, this Court a generation ago came close to repeating the mistake of *Plessy v. Ferguson*. See *Goesaert v. Cleary*, 335 U.S. 464 (1948). Fortunately, the Court already has acknowledged a new direction, see *United States v. Dege*, 364 U.S. 51, 54 (1960), and the case at bar provides the opportunity clearly and affirmatively to inaugurate judicial recognition of the constitutionally imperative claim made by women for the equal rights before the law guaranteed to all persons.

In sum, appellant urges in Point I of this brief that designation of sex as a suspect classification is overdue, is the only wholly satisfactory standard for dealing with the claim in this case, and should be the starting point for assessing that claim. Nonetheless, as developed in Point II of this brief, it should be apparent that the reasonable relation test also must yield a conclusion in favor of the appellant. Surely this Court cannot give its approval to a fiduciary statute that demands preference for an idler, because he is a man, and rejects a potentially diligent administrator solely because she is a woman. In addition to the argument based on the traditional reasonable relation test, Point II formulates a modification of that test, appropriate in the event this Court, contrary to appellant's primary position, would delay recognition of sex as a suspect classification. The proposed modification would reverse the presumption of rationality when sex is implicated and,

rather than requiring the party attacking a statute to show that the classification is irrational, would require the statute's proponent to prove it rational.

I.

The sex-based classification in Section 15-314 of the Idaho Code, established for a purpose unrelated to any biological difference between the sexes, is a "suspect classification" proscribed by the fourteenth amendment to the United States Constitution.

A. Sex as a Suspect Classification.

Commanding a preference for men and the subordination of women, Section 15-314 of the Idaho Code reflects a view, prevalent in the law a generation ago that, with minimal justification, the legislature could draw "a sharp line between the sexes." *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). Similarly, it was once settled law that differential treatment of the races was constitutionally permissible. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Today, of course, a classification based on race, nationality or alienage is inherently "suspect" or "invidious" and this Court has required "close judicial scrutiny" of a statute or governmental action based upon such a classification. *Graham v. Richardson*, — U.S. — (June 14, 1971). The proponent of a measure creating "classifications constitutionally suspect" must establish an "overriding statutory purpose," *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964), and bears "a very heavy burden of justification." *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

It is only within the last half-dozen years that the light of constitutional inquiry has focused upon sex discrimina-

tion. Emerging from this fresh examination, in the context of the significant changes that have occurred in society's attitudes,¹¹ is a deeper appreciation of the premise underlying the "suspect classification" doctrine: although the legislature may distinguish between individuals on the basis of their ability or need, it is presumptively impermissible to distinguish on the basis of congenital and unalterable biological traits of birth over which the individual has no control and for which he or she should not be penalized. Such conditions include not only race, a matter clearly within the "suspect classification" doctrine, but include as well the sex of the individual.¹²

The kinship between race and sex discrimination has attracted increasing attention. A capsule description of the close relationship between the two appears in *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 Harv. L. Rev. 1499, 1507-1508 (1971) (original footnotes retained but renumbered):

The similarities between race and sex discrimination are indeed striking.¹ Both classifications create large, natural classes, membership in which is beyond

¹ See A. Montagu, *Man's Most Dangerous Myth* 181-84 (4th ed. 1964); G. Myrdal, *An American Dilemma* 1073-78 (2d ed. 1962).

¹¹ See E. Dahlstrom ed., *The Changing Roles of Men and Women* (1967); A. Montagu, *Man's Most Dangerous Myth* 181-84 (4th ed. 1964); G. Myrdal, *An American Dilemma* 1073-78 (2d ed. 1962); Watson, *Social Psychology: Issues and Insights* 435-56 (1966); P. Murray & M. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 235-42 (1965).

¹² See *Hernandez v. Texas*, 347 U.S. 475, 478 (1954) ("The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and 'Negro.'").

the individual's control;² both are highly visible characteristics on which legislators have found it easy to draw gross, stereotypical distinctions. Historically, the legal position of black slaves was justified by analogy to the legal status of women.³ Both slaves and wives were once subject to the all-encompassing paternalistic power of the male head of the house.⁴ Arguments justifying different treatment for the sexes on the grounds of female inferiority, need for male protection, and happiness in their assigned roles bear a striking resemblance to the half-truths surrounding the myth of the "happy slave".⁵ The historical patterns of race and sex discrimination have, in many instances, produced similar present day results. Women and blacks, for example, hold the lowest paying jobs in industry, with black men doing slightly better than white women.⁶ . . .

The factual similarities between race and sex discrimination are reinforced by broader concerns. Through a process of social evolution, racial distinctions have become unacceptable. The old social consensus that race was a clear indication of inferiority has yielded to the notion that race is unrelated to ability or performance. Even allegedly rational attempts at racial classification are now generally re-

² See Crozier, *Constitutionality of Discrimination Based on Sex*, 15 Boston U.L. Rev. 723, 728 (1935). See also Report of the Committee on Civil and Political Rights to the President's Commission on the Status of Women 79 (1963).

³ G. Myrdal, *supra*, note 1 at 1073.

⁴ *Id.* at 1073-75.

⁵ See A. Montagu, *supra*, note 1 at 181.

⁶ See N.Y. Times, Jan. 31, 1971, § 1, at 50, col. 3.

jected outright. The burden of showing that these attempts are based on something other than prejudice is enormous.

There are indications that sex classifications may be undergoing a similar metamorphosis in the public mind. Once thought normal, proper, and ordained in the "very nature of things," sex discrimination may soon be seen as a sham, not unlike that perpetrated in the name of racial superiority. Whatever differences may exist between the sexes, legislative judgments have frequently been based on inaccurate stereotypes of the capacities and sensibilities of women. In view of the damage that has been inflicted on individuals in the name of these "differences," any continuing distinctions should, like race, bear a heavy burden of proof. One function of the fourteenth amendment ought to be to put such broad-ranging concerns into the fundamental law of the land.⁷

⁷ Cf. Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1174 n. 61 (1969) (as the truth of the proposition that biological differences between the sexes correlate with performance is drawn into question, all sexual classifications become more suspect).

Dr. Pauli Murray recently synopsized scholarly commentary on the same point in *The Negro Woman's Stake in the Equal Rights Amendment*, 6 Harv. Civ. Rts. Civ. Lib. Law Rev. 253, 257 (1971) (original footnotes retained but renumbered):

The relationship between sexual and racial prejudice is confirmed by contemporary scholarship.¹ The

¹ See, e.g., S. De Beauvoir, *THE SECOND SEX* 116, 297-98, 331, 714-715 (5th ed. H. Parshley trans. 1964); H. Hays,

history of western culture, and particularly of ecclesiastical and English common law, suggests that the traditionally subordinate status of women provided models for the oppression of other groups. The treatment of a woman as her husband's property, as subject to his corporal punishment, as incompetent to testify under canon law, and as subject to numerous legal and social restrictions based upon sex, were precedents for the later treatment of slaves. In 1850, George Fitzhugh, one of the foremost defenders of slavery in the United States analogized it to the position of women and children.² And in 1944, a justice of the North Carolina Supreme Court noted "the barbarous view of the inferiority of women which manifested itself in civil and political oppression so akin to slavery that we can find no adequate word to describe her present status with men except emancipation."³

Race and sex are comparable classes, defined by physiological characteristics, through which status is fixed from birth. Legal and social proscriptions based upon race and sex have often been identical, and have generally implied the inherent inferiority of the pro-

THE DANGEROUS SEX 178-79, 283 (1964); A. Montagu, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE*, Ch. 9 (4th ed. 1964); G. Myrdal, *AN AMERICAN DILEMMA*, App. V. (1944); A. Watson, *SOCIAL PSYCHOLOGY: ISSUES AND INSIGHTS*, Ch. 12 (1966); Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723, 727-28 (1935); Hacker, *Women as a Minority Group*, 30 SOCIAL FORCES 60 (1951).

² Fitzhugh, *Slavery Justified by a Southerner*, in E. McKittrick, *SLAVERY DEFENDED* 37-38 (1963).

³ *State v. Emery*, 224 N.C. 581, 596, 31 S.E.2d 858, 868 (1944) (Seawell, J. dissenting).

scribed class to a dominant group. Both classes have been defined by, and subordinated to, the same power group—white males.

When biological differences are not related to the activity in question,¹³ sex-based discrimination clashes with contemporary notions of fair and equal treatment. No longer shackled by decisions reflecting social and economic conditions or legal and political theories of an earlier era, see *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669-70 (1966),¹⁴ both federal and state courts have been

¹³ "To the degree women perform the function of motherhood, they differ from other special groups. But maternity legislation is not sex legislation; its benefits are geared to the performance of a special service much like veterans' legislation. When the law . . . regulates the conduct of women in a restrictive manner having no bearing on the maternal function, it disregards individuality and relegates an entire class to inferior status." P. Murray & M. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 239 (1965).

The "separate restroom" canard continues to be invoked as justification for perpetuation of "a sharp line between the sexes." E.g., Amending the Constitution to Prohibit State Discrimination Based on Sex, 26 The Record of the Association of the Bar of the City of New York 77, 80 (1971). This Court's recognition of the fundamental right to personal privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965), indicates that separate restrooms are not in jeopardy. The basic interest shared by members of both sexes in personal privacy surely justifies, and may even require, separation of the sexes in restrooms, sleeping quarters in prisons and other public institutions, separate living quarters for male and female members of the Armed Forces, police practices by which the search of a woman can be conducted only by another woman, and the search of a man only by another man. See T. Emerson, In Support of the Equal Rights Amendment, 6 Harv. Civ. Rts. Civ. Lib. L. Rev. 225, 231-32 (1971).

¹⁴ "In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of funda-

intensely skeptical of lines drawn or sanctioned by governmental authority on the basis of sex. Absent strong affirmative justification, these lines have not survived constitutional scrutiny.

A recent decision of the California Supreme Court, *Sail'er Inn, Inc. et al. v. Edward J. Kirby, Director, et al.*, 3 CCH Employment Practices Decisions ¶8222 (May 27, 1971), explicitly denominated sex a suspect classification and, consequently, held unconstitutional a California statute similar to the Michigan statute upheld by this Court in *Goesaert v. Cleary*, 335 U.S. 464 (1948). The California Supreme Court described the factors upon which its conclusion rested in the following terms [3 E.P.D. ¶8222, pp. 6756-6757 (footnotes omitted)]:

Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or contribute to society. (See Note: *Developments in the Law—Equal Protection*, *supra*, 82 Harv. L. Rev. 1065, 1173-1174.) The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. (See *Karczewski v. Baltimore and Ohio Railroad Company* (1967), 274 F. Supp. 169, 179.) Where the relation

mental rights [citations omitted]. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." (Emphasis in original.) See also n. 16 p. 22 *infra*.

between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious laws or practices.

Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. (See Note: *Developments in the Law—Equal Protection*, *supra*, 82 Harv. L. Rev. 1065, 1125-1127.) Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. Married women in particular have been treated as inferior persons in numerous laws relating to property and independent business ownership and the right to make contracts.

Laws which "disable women from full participation in the political, business and economic arenas are often characterized as "protective" and beneficial. Those same laws applied to racial or ethnic minorities would readily be recognized as invidious and impermissible. The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage. We conclude that the sexual classifications are properly treated as suspect, particularly when those classifications are made with respect to a fundamental interest such as employment.

See also *Mengelkoch v. Industrial Welfare Commission*, 437 F.2d 563 (9th Cir. 1971) (maximum hours law ap-

pllicable to women only presents substantial federal constitutional question which must be heard and decided by three judge federal district court); *Abbott v. Mines*, 411 F.2d 353 (6th Cir. 1969) (holding unconstitutional exclusion of women from jury in civil case concerning cancer of male genitals); *Kirstein v. Rector and Visitors of University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (three-judge court) (women entitled to equal access with men to state university's "prestige" college);¹⁵ *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court) (Alabama's exclusion of all women from jury service violates fourteenth amendment);¹⁶ *Cohen v. Chesterfield County School*

¹⁵ Cf. *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970) (three-judge court), affirmed without opinion, *U.S. —* (March 8, 1971) (females only admission policy for state supported college does not violate male students' right to equal protection where no showing was made of any feature rendering all female facility more advantageous educationally than state supported institutions to which males are admitted). *Kirstein* and *Williams* are not in conflict. Pairing the two, they reflect the opinion of distinguished academicians. See C. Jencks & D. Reisman, *The Academic Revolution* 298 (1968):

... we do not find the arguments against women's colleges as persuasive as the arguments against men's colleges. This is a wholly contextual judgment. If America were now a matriarchy (as some paranoid men seem to fear it is becoming) we would regard women's colleges as a menace and men's colleges as a possibly justified defense.

See also Note, *The Constitutionality of Sex Separation in School Desegregation Plans*, 37 U. Chi. L. Rev. 296 (1970).

¹⁶ "The argument that the Fourteenth Amendment was not historically intended to require the states to make women eligible for jury service reflects a misconception of the function of the Constitution and this Court's obligation in interpreting it. The Constitution of the United States must be read as embodying general principles meant to govern society and the institutions of government as they evolve through time. It is therefore this Court's function to apply the Constitution as a living document to the legal cases and controversies of contemporary society." 251 F. Supp. at 408.

Board, Civ. Action No. 678-79-R, E.D. Va. (Richmond Division), May 17, 1971 (regulation requiring female teacher to leave in the fifth month of her pregnancy violates her right to equal protection); *Seidenberg v. McSorleys' Old Ale House*, 317 F. Supp. 593 (S.D.N.Y. 1970), 308 F. Supp. 1253 (S.D.N.Y. 1969) (exclusion of women patrons from liquor licensed place of public accommodation violates fourteenth amendment); *Mollere v. Southeastern Louisiana College*, 304 F. Supp. 826 (E.D. La. 1969) (declaring unconstitutional requirement that unmarried women under 21 live in state college dormitory when no such requirement was imposed on men); *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968) (differential sentencing laws for men and women constitute "invidious discrimination" against women repugnant to the equal protection of the law guaranteed by the fourteenth amendment);¹⁷ *Owen v. Illinois Baking Corp.*, 260 F. Supp. 820 (W.D. Mich. 1966) (wife constitutionally entitled to same right as husband to recover for loss of consortium); *Pater-son Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970) (police power does not justify exclusion of women from bartender occupation); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968) (differential sentencing laws for men and women held unconstitutional);¹⁸ *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (inheritance tax on certain property when devised by husband to wife, but not when devised by wife to husband violates equal

¹⁷ Accord, *Liberti v. York*, 28 Conn. Supp. 9, 246 A.2d 106 (1968).

¹⁸ See also *Commonwealth v. Stauffer*, 214 Pa. Super. 113, 251 A.2d 718 (1969) (differential in condition of sentence—men to jail, women to penitentiary—declared unconstitutional).

protection guarantee); *Matter of Shpritzer v. Lang*, 17 A.D.2d 285, 289, 234 N.Y.S.2d 285, 289 (1st. Dept. 1962), *aff'd*, 13 N.Y.2d 744, 241 N.Y.S.2d 869 (1963) (exclusion of policewomen from promotional examination for sergeant would impermissibly deny constitutional rights solely because of sex); *Wilson v. Hacker*, 101 N.Y.S.2d 461 (Sup. Ct. 1950) (union's discrimination against female bartenders "must be condemned as a violation of the fundamental principles of American democracy").

The trend is clearly discernible. Legislative discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another condition of birth, and merits no greater judicial deference. Each exemplifies a "suspect" or "invidious" classification.¹⁹

B. Women as a Disadvantaged Second Sex.

While the characteristics that make a classification "suspect" have not been defined explicitly by this Court, compare *Sail'er Inn v. Kirby*, *supra*, a series of cases delineates as the principal factor the presence of an unalterable identifying trait which the dominant culture views as a badge of inferiority justifying disadvantaged treatment in social, legal, economic and political con-

¹⁹ It is not urged here that extensive compensatory treatment is needed to redress past discrimination against women. Cf. *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1104-1119 (1969). *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir.), cert. denied, 393 U.S. 982 (1968), however, indicates that in special situations compensatory treatment may be appropriate.

Although women are not a numerical minority, the impact of sex-role stereotyping is illustrated graphically by their lack of political power. At all levels of government, few women hold elected or appointed office. See Handbook 118-26.

texts. Although the paradigm suspect classification is, of course, one based on race, this Court has made it plain that the doctrine is not confined to a "two-class theory." *Graham v. Richardson*; — U.S. — (June 14, 1971); *Hernandez v. Texas*, 347 U.S. 475, 478 (1954); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); see *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948); *Oyama v. California*, 332 U.S. 633 (1948). Rather, interpretation has been dynamic, as is appropriate to fundamental constitutional principle. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669-70 (1966); *White v. Crook*, 251 F. Supp. 401, 408 (M.D. Ala. 1966) (three-judge court).

American women have been stigmatized historically as an inferior class and are today subject to pervasive discrimination. As other groups that have been assisted toward full equality via the suspect classification doctrine, women lack political power to remedy the discriminatory treatment they are accorded in the law and in society generally. This section synthesizes attitudes toward women traditional in the United States and the principal areas in which the law limits the opportunities available to women for participation as full and equal members of society.

"'Man's world' and 'women's place' have confronted each other since Scylla first faced Charybdis."²⁰ A person born female continues to be branded inferior for this congenital and unalterable condition of birth.²¹ Her position in this country, at its inception, is reflected in the expression of the author of the declaration that "all men are created

²⁰ E. Janeway, *Man's World Woman's Place: A Study in Social Mythology* 7 (1971).

²¹ See C. Bird, *Born Female: The High Cost of Keeping Women Down* (1968).

equal." According to Thomas Jefferson, women should be neither seen nor heard in society's decision-making councils:

Were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men. Quoted in M. Gruberg, *Women in American Politics* 4 (1968).

Alexis de Tocqueville, some years later, included this observation among his commentaries on life in the young United States:

In no country has such constant care been taken as in America to trace two clearly distinct lines of action for the two sexes, and to make them keep pace one with the other, but in two pathways which are always different. American women never manage the outward concerns of the family, or conduct a business, or take a part in political life. . . . Democracy in America, pt. 2 (Reeves tr. 1840), in *World's Classics Series*, Galaxy ed., p. 400 (1947).²²

During the long debate over women's suffrage the prevailing view of the partition thought ordained by the Creator was rehearsed frequently in the press and in legislative chambers. For example, an editorial in the *New York Herald* in 1852 asked:

²² Cf. Ibsen's observation on the society of his day:

A woman cannot be herself in a modern society. It is an exclusively male society with laws made by men, and with prosecutors and judges who assess female conduct from a male standpoint. Quoted in Meyer, *Introduction to H. Ibsen*, *A Doll's House* at 9 (M. Meyer transl. 1965).

How did women first become subject to man as she now is all over the world? By her nature, her sex, just as the negro, is and always will be, to the end of time, inferior to the white race, and, therefore, doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature. The women themselves would not have this law reversed Quoted in A. Kraditor, *Up From the Pedestal: Selected Writings in the History of American Feminism* 190 (1968).

And a legislator commented during an 1866 debate in Congress:

It seems to me as if the God of our race has stamped upon [the women of America] a milder, gentler nature, which not only makes them shrink from, but disqualifies them for the turmoil and battle of public life. They have a higher and holier mission. It is in retracy [sic] to make the character of coming men. Their mission is at home, by their blandishments and their love to assuage the passions of men as they come in from the battle of life, and not themselves by joining in the contest to add fuel to the very flames. . . . It will be a sorry day for this country when those vestal fires of love and piety are put out. Quoted in E. Flexner, *Century of Struggle* 148-49 (1970 ed.), from *Congressional Globe*, 39 Cong., 2d Sess., Part I, p. 66.

The common law heritage, a source of pride for men, marked the wife as her husband's chattel, "something better than his dog, a little dearer than his horse."²³ Blackstone explained:

²³ Alfred Lord Tennyson, *Locksley Hall* (1842).

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-french a *feme-covert* . . . under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*. 1 Blackstone's Commentaries on the Law of England 442 (3d ed. 1768).²⁴

Prior to the Civil War, the legal status of women in the United States was comparable to that of blacks under the slave codes, albeit the white woman ranked as "chief slave of the harem."²⁵ Neither slaves nor married women had the legal capacity to hold property or to serve as guardians of their own children. Neither blacks nor women could hold office, serve on juries, or bring suit in their own names. Men controlled the behavior of both their slaves and their wives and had legally enforceable rights

²⁴ An earlier formulation of the same thesis was set out in The Lawes Resolutions of Womens Rights (London, 1632):

Man and wife are one person, but understand in what manner. When a small brooke or little river incorporateth with Rhodanus, Humber or the Thames, the poor rivulet looseth its name, it is carried and recarried with the new associate, it beareth no sway, it possesseth nothing during coverture. A woman as soon as she is married, is called *covert*, in Latin, *nupta*, that is, *veiled*, as it were, clouded and overshadowed, she hath lost her streamè. . . . To a married woman, her new self is her superior, her companion, her master. Quoted in E. Flexner, *Century of Struggle* 7-8 (1970 ed.).

²⁵ Comment attributed to Dolly Madison, in H. Martineau, *Society in America*, Vol. 2, p. 81 (1842, 1st ed. 1837).

to their services without compensation. See pp. 15-19, *supra*. See also L. Kanowitz, *Women and the Law: The Unfinished Revolution* 5-6 (1969). As Gunnar Myrdal remarked, the parallel was not accidental, for the legal status of women and children served as the model for the legal status assigned to black slaves:

In the earlier common law, women and children were placed under the jurisdiction of the paternal power. When a legal status had to be found for the imported Negro servants in the seventeenth century, the nearest and most natural analogy was the status of women and children. The ninth commandment—linking together women, servants, mules and other property—could be invoked, as well as a great number of other passages of Holy Scripture. *An American Dilemma* 1073 (2d ed. 1962).

In answer to feminist protests, the legal disabilities imposed on women were rationalized at the turn of the century much as they were at an earlier age. Blackstone set the pattern:

[E]ven the disabilities which the wife lies under are for the most part intended for her protection and benefit: so great a favourite is the female sex of the laws of England. 1 Blackstone's Commentaries on the Laws of England 445 (3d ed. 1768).

Grover Cleveland echoed this rationale, arguing that although women were denied the vote, the statute books were full of proof of the chivalrous concern of male legislators for the rights of women. *Would Woman Suffrage Be Unwise?*, 22 *Ladies' Home Journal* 7-8 (October 1905). Quoted in A. Kraditor, *Up from the Pedestal: Selected Writings in the History of American Feminism* 199-203 (1968).

American women assessed their situation from a different perspective. At the Women's Rights Convention in Seneca Falls, New York, in 1848, a declaration of women's rights was drafted which included the following sentiments:

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. . . .

He has compelled her to submit to laws, in the formation of which she had no voice.

• • • • •

He has taken from her all right in property, even to the wages she earns.

• • • • •

. . . . In the covenant of marriage, . . . the law gives him power to deprive her of her liberty and to administer chastisement.

• • • • •

. . . . He closes against her all the avenues to wealth and distinction which he considers most honorable to himself. . . .

• • • • •

He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.

History of Woman Suffrage, Vol. I, at 70-75 (E. C. Stanton, S. B. Anthony & N. J. Gage eds. 1881).

Men viewing their world without rose-colored glasses would have noticed in the last century, as those who look will observe today, that no pedestal marks the place occupied by most women. At a women's rights convention in Akron, Ohio, in 1851, Sojourner Truth, an abolitionist and former slave, responded poignantly to the taunts of clergymen who maintained that women held a favored position and were too weak to vote:

The man over there says women need to be helped into carriages and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages or over puddles, or gives me the best place—and ain't I a woman?

Look at my arm! I have ploughed and planted and gathered into barns, and no man could head me—and ain't I a woman? I could work as much and eat as much as a man—when I could get it—and bear the lash as well! And ain't I a woman? I have born thirteen children, and seen most of 'em sold into slavery, and when I cried out with my mother's grief, none but Jesus heard me—and ain't I a woman? E. Flexner, *Century of Struggle* 90-91 (1970, ed.).

Of course, the legal status of women has improved since the nineteenth century. The Married Women's Property Acts, passed in the middle of the nineteenth century, opened the door to a measure of economic independence for married women. See L. Kanowitz, *Women and the Law: The Unfinished Revolution* 40-41 (1969). The nineteenth amendment gave women the vote in 1920, after almost three-quarters of a century of struggle.²⁶ But woman's place as

²⁶ See E. Flexner, *Century of Struggle* (1970 ed.); W. O'Neill, *Everyone Was Brave: The Rise and Fall of Feminism in America* (1969); L. Noun, *Strong-Minded Women* (1969).

subordinate to man is still reflected in many statutes regulating diverse aspects of life. A small sample of those statutes is contained in the Appendix, *infra*, pp. 69-88. Some of the areas in which women receive less favored treatment than men are summarized below.

1. Male as head of household

It remains the general rule that a wife's domicile follows that of her husband. The Idaho provision is typical:

The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto. Idaho Code sec. 32-902 (1947).

Thus the law subordinates a woman's work and home preference to her husband's. If the two are in fact living apart, the attribution of husband's domicile to wife may nullify her right to vote, to run for public office, or to serve as administrator of an estate.²⁷ A 1968 survey of the laws of all of the states revealed only five that permit a married woman to establish a separate domicile for all purposes, eight that permit a separate domicile for eligibility for public office, six that permit a separate domicile for jury service, eight that recognize a separate domicile for probate, nine that permit a separate domicile for taxation, and eighteen that permit a separate domicile for voting. Report of the Task Force on Family Law and Policy to the Citizens' Advisory Council on the Status of Women 47-49 (1968).

The social custom in the United States that upon marriage a woman takes her husband's surname, and ceases

²⁷ E.g., Idaho Code sec. 15-317(1).

to be known by her maiden name, is supported by laws and decisions that deal harshly with a woman who seeks to retain her separate identity. See Kanowitz, *Women and the Law: The Unfinished Revolution* 41-46 (1969). For example, in *Bacon v. Boston Elevated Ry.*, 256 Mass. 30, 152 N.E. 35 (1926), a married woman who retained her car registration in her maiden name was declared a "nuisance on the highway" and therefore barred from maintaining an action for injuries occasioned when her car was struck by a train. A federal decision of the same order is *In re Kayaloff*, 9 F. Supp. 176 (S.D.N.Y. 1934), holding that a married woman should not be granted a naturalization certificate in her maiden name, although in her career as a musician she was well-known by that name. For voting purposes the married woman, but not the married man, may be required to indicate marital status. N.J.S.A. 19:31-3(b)(1) (married woman shall prefix her name by the word "Mrs.", single women, by the word "Miss"). Cf. *Rago v. Lipsky*, 327 Ill. App. 63, 63 N.E.2d 642 (1945) (lawyer admitted to practice in state and federal courts and United States Supreme Court in her maiden name denied the right to register to vote in that name).

The common law system of separate ownership of property by each spouse, effective in most states, fails to accord adequate recognition to the contribution to the family made by a wife who works only in the home. By accepting a "woman's place" and relieving her husband of the burdens of child and home care, she foregoes the opportunity to acquire earnings and property of her own. In community property states, in which marriage is regarded in theory as an economic partnership, management and control generally vest exclusively in the husband. See Report of the

Task Force on Family Law and Policy to the Citizens' Advisory Council on the Status of Women 16 (1968); President's Commission on the Status of Women, Report of the Committee on Civil and Political Rights 16 (1963) (recommending complete reappraisal of the law governing matrimonial property in all jurisdictions).²⁸ And although Married Women's Property Acts were passed over a century ago, numerous anachronistic limitations on the contractual capacity of women survive. See L. Kanowitz, *Women and the Law: The Unfinished Revolution* 55-69 (1969).

2. Women and the role of motherhood

The traditional division within the home—father decides, mother nurtures—is reinforced by diverse provisions of state law. For example, several retain general statutes reflecting the common law rule that father is sole guardian of the children. See Appendix, *infra* pp. 74-76. More particularized provisions include the Washington rule that father, not mother, is qualified to sue for the wrongful death of a legitimate child. Wash. Code sec. 4.24.010. In Idaho, the father presumptively may make a testamentary guardianship appointment for a child, while the mother may do so only if the father is dead or incapable of consent. Idaho Code sec. 15-1812.

If the parents separate, mother generally gets custody preference when the child is of tender years. But if the child is older, and needs preparation for the world, prefer-

²⁸ Enlightened by the matrimonial property systems effective in the Scandinavian countries, Texas had amended its law to provide for joint management of community property. Texas Rev. Civ. Stats. art. 4621. But cf. *Perez v. Campbell*, 421 F.2d 619 (9th Cir. 1970), reversed, 401 U.S. — (1971).

ence may go to father. E.g., Mont. Rev. Code Ann. sec. 91-4515 (1947).

Most states permit girls to marry without parental consent at an earlier age than boys.²⁹ The differential, generally three years, reflects two presumptions: (1) the married state is the only proper goal of womanhood; (2) men need more time to prepare for bigger, better and more useful pursuits. L. Kanowitz, *Women and the Law: The Unfinished Revolution* 11 (1969).

3. Women and criminal law

As of 1970, women served on juries on the same basis as men in only 28 states. See note 50, *infra*. Differential treatment for women in the remaining states takes a variety of forms. Some states automatically exempt women on the basis of their sex alone; others exempt women, but not men, who have child care responsibilities; and some exempt women based on the nature of the proceeding or inadequate courthouse facilities. See L. Kanowitz, *Women and the Law: The Unfinished Revolution* 28-31 (1969).

In most states, only a woman can be prosecuted as a "prostitute" and only her conduct, not her male partner's, is criminal. L. Kanowitz, *supra* at 16-18; G. Mueller, *Legal Regulations of Sexual Conduct* 50 (1961).

Special treatment of female juvenile offenders is another example of the double standard in operation. In New York, for example, a child can be declared a "person

²⁹ See Table on State Marriage Laws as of December 1, 1969, in Hearings on S.J. Res. 61, Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. 728 (1970).

in need of supervision"³⁰ for acts that would be non-criminal if committed by an adult. New York Family Court Act sec. 712(b). While there may be sound reasons for this special category for juveniles, there can be no constitutional justification for New York's treatment of young women as "persons in need of supervision" until age 18, while boys are subject to the statute only until age 16. In addition to the age differential, the statute discriminates against girls in a manner less apparent but no less real. A charge of ungovernability against a girl occurs most frequently as a promiscuity-control device. A study of 1500 cases decided by a New York juvenile court judge revealed that he "refused to treat any form of sexual behavior on the part of boys, even the most bizarre forms, as warranting more than probationary status. The Judge, however, regarded girls as the cause of sexual deviation in boys in all cases of coition involving an adolescent couple and refused to hear the complaints of the girl and her family; the girl was regarded as a prostitute." Reiss, *Sex Offenses: The Marginal Status of the Adolescent*, 25 *Law and Contemporary Problems* 310, 316 (1960).

While a very young woman is considered dangerous for her sexuality, in adult life she is considered far less passionate than the adult man. At least this appears to be the view of states that allow the defense of "passion killing" only to the wronged husband. Texas Penal Code 1220; Utah Code sec. 76-30-10 (4).

³⁰ A person who is a "habitual truant . . . incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority."

4. Women and employment

Current tax law presents a significant disincentive to the woman who contemplates combining a career with marriage and a family. If a wife's earnings approach those of her husband, the Internal Revenue Code counsels divorce, for the couple will retain more if they live together without benefit of a marriage license. See B. Richards, *Single v. Married Income Tax Returns under the Tax Reform Act of 1969*, 48 *Taxes* 301 (1970). And if a father or mother goes off to work as a divorcee, he or she may be entitled to a child care deduction regardless of income. For a married pair, both working, however, the deduction is available only if joint adjusted gross income of the couple remains close to the subsistence level. Internal Revenue Code sec. 214. See *A Matter of Simple Justice: Report of the President's Task Force on Women's Rights and Responsibilities* 15 (1970). Moreover, the size of the deduction (\$600) renders it of scant assistance even to the few who qualify for it.³¹

Despite the tax disincentive, married women are entering the labor force in increasing numbers. In the two decades between 1947 and 1967, the percentage of women in the labor force increased by 70%, from an average of 24% to an average of 41%. Married women constitute a majority of full-time women workers. Report of the Task Force on Labor Standards to the Citizens' Advisory Council on the Status of Women 6-7 (1968). This development is particularly remarkable in view of the deplorable shortage of child care facilities. During World War II,

³¹ For a person who works 40 hours a week, 50 weeks a year, and spends an hour each work day traveling to and from the place of employment, the \$600 amount represents a deduction of less than 30¢ an hour for baby sitting expenses.

when women workers were essential to the economy, provision was made for the care of some 1,600,000 children. By 1967, although more women were in the labor force, only 200,000 children were accommodated. Dept. of Health, Education and Welfare, Children's Bureau, Childcare Arrangements for the Nation's Working Mothers 1 (1969). Although the dire need for commitment of substantial resources to development of childcare facilities is beginning to be appreciated,³² progress has been slow. For example, in New York City, day care services may not be provided for children under the age of two. New York City Health Code, sec. 47.07(a)(1).³³ Moreover, an explanatory note to this section states:

[I]t is recognized that as an ultimate goal, it is not desirable to permit children under three years of age in a day care service, and many services now have a policy of not admitting such children. . . .

In April 1971, 42.7% of all women sixteen years of age or older were in the labor force³⁴ as compared to 28.9% in March 1940.³⁵ But wage statistics are indicative of the pervasive sex discrimination still characteristic of the labor market. The wage or salary income for full-time

³² E.g., S. 1512, currently before the Senate Committee on Labor and Public Welfare; H.R. 6748, currently before the House Committee on Education and Labor.

³³ Art. 53 of the New York City Health Code authorizes day care of no more than two children under the age of two in a private household. Certificates of approval for such private household care may be issued only to a woman. Sec. 53.07(d).

³⁴ Dept. of Labor, Bureau of Labor Statistics: Employment and Earnings, May 1971 at 34-35.

³⁵ Handbook 10.

year-round women workers dropped from 63.9% of male workers' salaries in 1956 to 58.2% in 1968.³⁶

The disparity in earnings is often discounted by men who accept the myth that women are secondary workers seeking employment only to enjoy some consumer luxuries. But in fact, almost 60% of all employed women work in order to provide primary support of themselves or others or to supplement the incomes of husbands who earn under \$5,915 a year.³⁷

Within occupational categories, women are paid less for the same jobs. For example, in 1968 the median salary for all scientists was \$13,200. For women scientists, the median salary was \$10,000.³⁸ The median wage for a full-time male factory worker in 1968 was \$6,738. His female counterpart earned only \$3,991.³⁹ Differences in work experience, job tenure and training do not account for these large gaps. Cf. McNally, *Patterns of Female Labor Force Activity*, Industrial Relations 204 (May 1968).

Women at work remain heavily concentrated in a small number of sex-stereotyped occupations. In 1968, about one-quarter of all employed women worked in only five occupations: secretary-stenographer, household worker, bookkeeper, elementary school teacher, and waitress. Over a third of all employed women held clerical jobs; 70% of

³⁶ Dept. of Labor, Women's Bureau: *Fact Sheet on the Earnings Gap 1* (Feb. 1970) [hereinafter *Fact Sheet on the Earnings Gap*].

³⁷ Dept. of Labor, Women's Bureau: *Why Women Work 1* (Jan. 1970).

³⁸ *Fact Sheet on the Earnings Gap 2*.

³⁹ *Ibid.*

all clerical positions were filled by women.⁴⁰ Two-thirds of the female labor force would have to change jobs to achieve an occupational distribution corresponding to that of men. Indeed, the index of occupational segregation by sex is approximately the same now as it was in 1900. See E. Gross, *Plus ça change . . . ? The Sexual Structure of Occupations Over Time*, 16 *Social Problems* 198, 202 (Fall 1968).

Beyond doubt, the status of women in the labor force is separate and unequal. The consequence for the nation is severe: almost two-thirds of this country's adult poor are women. See *A Matter of Simple Justice: Report of the President's Task Force on Women's Rights and Responsibilities* 24 (1970). Compare *id.* at 21:

Without any question, the growing number of families on Aid to Families with Dependent Children is related to the increase in unemployed young women. For many . . . the inability to find a job means . . . having a child to get on welfare. Potential husbands do not earn enough to support an unemployed wife.

The stability of the low-income family depends as much on training women for employment as it does on training men

The task force expects welfare rolls will continue to rise unless society takes more seriously the needs of disadvantaged girls and young women.

While this brief survey offers merely a sample of the legal and economic realities of woman's inferior status, it should suffice to indicate a compelling need for correction. Strict scrutiny of classifications disadvantaging the "sub-

⁴⁰ Handbook 87-103.

missive majority,"⁴¹ the "majority" so sparsely represented in legislative and policy-making chambers, should speed the day when emancipated men accept Mill's thesis:

That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to other—is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.

John Stuart Mill, *The Subjection of Women* (1869)⁴²

C. *Muller, Goesaert and Hoyt.*

Three decisions of this Court bear particularly close examination for the support they appear to give those who urge perpetuation of the treatment of women as less than full persons within the meaning of the Constitution: *Muller v. Oregon*, 208 U.S. 412 (1908); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Hoyt v. Florida*, 368 U.S. 57 (1961).

A landmark decision of this Court responding to turn of the century conditions when women labored long into the night in sweatshop operations,⁴³ *Muller v. Oregon*, 208

⁴¹ F. Seidenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 *Cornell L. Rev.* 262 (1970).

⁴² In *World's Classics Series*, *Three Essays by J. S. Mill* 427 (1966).

⁴³ For historical perspective, see E. Baker, *Protective Labor Legislation* 101, 149-277, 444-456 (1925); E. Flexner, *Century of Struggle: The Women's Rights Movement in the United States* 203-15 (1970 ed.).

U.S. 412 (1908),⁴⁴ has been misinterpreted by some as an impediment to appellant's position. Recently, in a perceptive opinion, the Court of Appeals for the Ninth Circuit focused on the different societal climate and legal setting in which *Muller* was decided, and demonstrated that the equal protection issue presented here was not at all involved in that case. *Mengelkoch v. Industrial Welfare Commission*, 437 F.2d 563 (9th Cir. 1971).

The issue in *Muller* was the constitutionality of a state statute prohibiting employment of women "in any mechanical establishment, factory, or laundry" for more than ten hours a day. *Muller*, a laundry owner, was prosecuted for violating the statute and was convicted. *Muller* contended in this Court that the statute abridged freedom of contract in violation of the fourteenth amendment, that it was class legislation, and that it was an invalid exercise of the police power because it lacked a reasonable relation to public health, safety or welfare. 208 U.S. at 417-18. He relied principally upon *Lochner v. New York*, 198 U.S. 45 (1905), which had struck down only three years earlier a state statute limiting employment (of men as well as women) in bakeries to ten hours each day and sixty hours each week.

To distinguish *Lochner*, the Court was required to rely upon differences in the station occupied by men and women in the society of that day. Interwoven in the opinion are two themes: (1) recognition of the intolerable exploitation of women workers ("in the struggle for subsistence she is

⁴⁴ *Muller* was followed in several cases presented in much the same societal climate and legal setting: *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Radice v. New York*, 264 U.S. 292 (1924); *Bosley v. McLaughlin*, 236 U.S. 385 (1915); *Miller v. Wilson*, 236 U.S. 373 (1915); *Riley v. Massachusetts*, 232 U.S. 671 (1914).

not an equal competitor with her brother" (208 U.S. at 422)); (2) concern for the health of the sex believed to be weaker in physical structure but assigned the role of bearing the future generation ("the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race" (208 U.S. at 421)). Accepting as historic fact man's domination of woman, the Court stressed that women must "rest upon and look to [man] for protection" and, somewhat inconsistently, that she requires aid of the law "to protect her from the greed as well as the passion of man." 208 U.S. at 422.

Putting *Muller* in its proper place, the Ninth Circuit, in *Mengelkoch v. Industrial Welfare Commission*, 437 F.2d 563 (1971), presented three reasons for its lack of precedential value in a case such as the one at bar.

First, it was the *Muller* Court's task to determine "whether the state, in exerting its police power to the end of establishing maximum hours of labor for women, acted with the wisdom which, in those days, it was thought was required by the Due Process Clause. That kind of inquiry is no longer made by the federal courts. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)." 437 F.2d at 567.

Second, in *Mengelkoch*, as in *Muller*, a state statute limiting hours of work for women only was challenged on constitutional grounds, but the basis of the challenge, and the identity of the challenger put the two cases at opposite poles. As the Ninth Circuit explained:

In our case, the constitutional attack against a state statute is mounted, not by an employer, but by an employee. The employee, Velma Mengelkoch, unlike the

employer in *Muller*, does not question the state's police power to legislate in the field of hours of labor. Unlike *Muller*, she invokes the Equal Protection Clause, and she does so not to preserve the right of employers to employ women for long hours, but to overcome what she regards as a system which discriminates in favor of male employees and against female employees. In *Muller*, the statute was upheld in part because it was thought to be a necessary way of safeguarding women's competitive position. Here the statute is attacked on the ground that it gives male employees an unfair economic advantage over females. 437 F.2d at 567.

Here, as in *Mengelkoch*, the challenger is a woman and she invokes the equal protection clause to shield her against discrimination. Of course, the second point made by the Ninth Circuit in *Mengelkoch* applies with even greater force to the case at bar. Perhaps the California legislature, decades ago when it originally enacted the legislation at issue in *Mengelkoch*, was motivated by an intent to protect women against "the greed as well as the passion of man."⁴⁵ The Idaho statute here at issue lacks even that ostensible justification. It was not designed to protect women. On the contrary, it is explicit in its deliberate subordination of women to men for expediency's sake.

Third, the *Muller* Court, unprepared to overrule *Lochner* barely three years after it was decided, had to place men and women in different categories in order to escape its

⁴⁵ *Muller v. Oregon*, 208 U.S. 412, 422 (1908). But see E. Baker, *Protective Labor Legislation* 101, 444-56 (1925); M. Wade, ed., *Writings of Margaret Fuller* 124 (1941): "As the friend of the Negro assumes that one man cannot by right hold another in bondage, so would the friend of Woman assume that Man cannot by right lay even well-meant restrictions on Woman."

prior holding. As the Ninth Circuit pointed out, "the right of states to prescribe maximum hours of labor by employees, including male employees, has been recognized since at least *Bunting v. Oregon*, 243 U.S. 426 (1917)." 437 F.2d at 567. And in 1940, in *United States v. Darby*, 312 U.S. 100, this Court completely repudiated the reasoning responsible for the *Lochner* decision. Thus, the critical issue in *Muller*—whether half a loaf would be allowed to state legislatures after the full loaf was denied by the Court—long ago lost all vitality.

In sum, *Muller* was a product of social conditions and constitutional theory peculiar to an earlier era in this nation's history. It is entirely irrelevant to the issue presented here, whether sex-based classifications are "suspect." The wholly different constitutional perspective, the difference in the nature of the claims, and the magnitude of the disparity between present day social and cultural norms and those prevailing at the time of *Muller*, require the conclusion that *Muller* has no bearing at all on the issue at bar.

While *Muller* reflects the law in mid-passage from *Lochner* to *Darby*, *Goesaert v. Cleary*, 335 U.S. 464 (1948) hardly exemplifies a first step toward enlightened change. It was retrogressive in its day and is intolerable a generation later. Unlike *Muller*, *Goesaert* was not intended to assist women "in the struggle for subsistence" or to safeguard women's competitive position. The statute at issue in *Goesaert*, although it allowed women to serve as waitresses in taverns, barred them from the more lucrative employment of bartender. In contrast to the protective motive apparently present in *Muller*, the actual motivation behind the statute in *Goesaert* was said by the appellant

to be "an unchivalrous desire of male bartenders to try to monopolize the calling." 335 U.S. at 467. E. Baker, Protective Labor Legislation 444-56 (1925).

The majority opinion in *Goesaert* reflects an antiquarian male attitude towards women—man as provider, man as protector, man as guardian of female morality. While the attitude is antiquarian, unfortunately it is still indulged even by persons who would regard as anathema attribution of inferiority to racial or religious groups. But however much some men may wish to preserve Victorian notions about woman's relation to man, and the "proper" role of women in society, the law cannot provide support for obsolete male prejudices or translate them into statutes that enforce sex-based discrimination.

Although recognizing that society had advanced beyond the Victorian age, Mr. Justice Frankfurter stated for the *Goesaert* majority, "The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." 335 U.S. at 466. But only six years later, this Court explicitly relied upon "sociological insight" and contemporary "social standards" in declaring racial segregation unconstitutional. *Brown v. Board of Education*, 347 U.S. 483, 489 n. 4, 493, 494-95 n. 11 (1954).⁴⁶

Perhaps the *Brown* decision led Mr. Justice Frankfurter to reconsider the position he expressed in *Goesaert*. In any

⁴⁶ Had the *Goesaert* majority taken a less static view of the Constitution as it relates to women's rights, it might have used the occasion, much as the *Brown* court did, to clear away old debris. E.g., *Bradwell v. Illinois*, 83 U.S. 130 (1872) (equal protection clause does not preclude a state from barring women from the practice of law).

event, in 1960, he refused to rely on "ancient doctrine" concerning the status of women. In *United States v. Dege*, 364 U.S. 51 (1960), he buried the historic common law notion that husband and wife are legally one person. Writing for the Court, he declared, "we . . . do not allow ourselves to be obfuscated by medieval views regarding the legal status of women and the common law's reflection of them." 364 U.S. at 52. Precedent from an earlier age was appraised by Mr. Justice Frankfurter as expressing a view of womanhood "offensive to the ethos of our society." 364 U.S. at 53. Sounding the death-knell as well of *Goesaert's* disregard of "sociological insight or shifting social standards," he quoted Mr. Justice Holmes and applied the quoted wisdom to the case before him:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *Collected Legal Papers*, 187 (1920), reprinting *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

For this Court now to act on Hawkins's formulation of the medieval view that husband and wife "are esteemed but as one Person in Law, and are presumed to have but one Will" would indeed be "blind imitation of the past." It would require us to disregard the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife's legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country. 364 U.S. at 53-54.

Unfortunately, Mr. Justice Frankfurter's observation in *Dege* does not correspond to contemporary reality. As this case and the statutes set out in the Appendix, *infra*, illustrate, the law-sanctioned subordination of wife to husband, mother to father, woman to man, is not yet extinguished in this country.

A federal court deciding a closely related issue, and two state courts deciding the identical issue, found scant difficulty in dispatching *Goesaert*.

In *Seidenberg v. McSorleys' Old Ale House*, 317 F. Supp. 593 (S.D.N.Y. 1970), Judge Mansfield declared a tavern owner's exclusion of women patrons inconsistent with the fourteenth amendment. In answer to the argument that *Goesaert* was controlling, he stated:

Nor do we find any merit in the argument that the presence of women in bars gives rise to "moral and social problems" against which McSorleys' can reasonably protect itself by excluding women from the premises. Social mores have not stood still since that argument was used in 1948 to convince a 6-3 majority of the Supreme Court that women might rationally be prohibited from working as bartenders unless they were wives or daughters of male owners of the premises. 317 F. Supp. at 606.

In *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970), the New Jersey Supreme Court considered a local ordinance which, like the statute in *Goesaert*, denied women the right to tavern employment behind the bar. Indicative of the change in social norms to which Judge Mansfield referred in *Seidenberg v. McSorleys' Old Ale House*, the New Jersey

case presented this interesting difference in party line-up: The plaintiffs were a male tavern owner who wished the freedom to select a woman bartender, and an association of tavern owners. The New Jersey Supreme Court ruled that in the light of current customs and mores, "the municipal restriction against female bartending may no longer fairly be viewed as a necessary and reasonable exercise of the police power." 57 N.J. at 186, 270 A.2d at 631. It concluded, reminiscent of this Court's expressions in *United States v. Dege*:

While the law may look to the past for the lessons it teaches, it must be geared to the present and towards the future if it is to serve the people in just and proper fashion. In the current climate the law may not tolerate blanket municipal bartending exclusions grounded solely on sex. 57 N.J. at 189, 270 A.2d at 633.

Finally, the California Supreme Court in *Sail'er Inn Inc. v. Kirby*, *supra* at p. 6758, said of *Goesaert*: "Although *Goesaert* has not been overruled, its holding has been the subject of academic criticism . . . and its sweeping statement that the states are not constitutionally precluded from 'drawing a sharp line between the sexes' has come under increasing limitation."

In sum, *Goesaert's* sanction of "a sharp line between the sexes" and its "blind imitation of the past" have rendered it a burden and an embarrassment to state and federal courts; enlightened jurists politely discard it as precedent, refusing "to be obfuscated by medieval views regarding the legal status of women." It should be plain that no one would now mourn its formal burial.

Hoyt v. Florida, 368 U.S. 57 (1961), completes the trilogy of cases invoked most frequently to justify second class status for women. In *Hoyt*, this Court sustained a Florida statute limiting jury service by women to those who registered with the court a desire to be placed on the jury list.⁴⁷ That case, although it harks back to the stereotyped view of women rejected in *United States v. Dege*, 364 U.S. 51 (1960), is readily distinguishable. Unlike the situation now before the Court, in which a woman's disqualification is mandated whenever a male contender appears, in *Hoyt*, the Court "found no substantial evidence whatever in this record that Florida has arbitrarily undertaken to exclude women from jury service." 368 U.S. at 69. Underscoring the point, the three concurring Justices stated their inability to find "from this record that Florida is not making a good faith effort to have women perform jury duty without discrimination on the ground of sex." 368 U.S. at 69.

While the *Hoyt* holding offers no support at all for a statute of the Idaho Code sec. 15-314 genre, in which discrimination on the ground of sex is undisguised, this Court included language in the opinion that has been turned against women who seek to realize their full potential as individual human beings:

Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, *woman is*

⁴⁷ Despite the *Hoyt* decision, the Florida statute was amended to call women for jury service on the same basis as men; the statute now limits its special female exemptions to pregnant women and women with children under the age of eighteen who affirmatively request exemptions. Fla. Stat. Ann. §40.01, as amended, Laws 1967, c. 67-154, §1.

still regarded as the center of home and family life. We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. 368 U.S. at 61-62. (Emphasis supplied.)

While an image of woman, first and predominantly as keeper of the hearth, might have been expected from jurists writing at the turn of the century, it is disquieting to find the antiquated stereotype repeated so late in the day. Even in times past, when the absence of family planning and effective birth-control devices restricted options for most women, many by choice or fortune did not play the role of mother-wife. Today, of course, scientific developments have placed the choice and timing of parenthood within the realm of individual decision. Even for those who suspend or curtail economic activity to care for offspring, the period devoted to child-rearing is limited. In these days of longevity, most women, for the larger part of their lives, are not preoccupied with child care functions.⁴⁸

The brief reversion to stereotype in the *Hoyt* opinion has had unfortunate consequences. For example, in a 1970

⁴⁸ "Women today live 25 years longer than they did at the turn of the century; half of today's women are married by the time they are 21; and the average mother has her last child enter school when she is 30. When her youngest child enters school today's mother has 40 years of life yet ahead. The challenge to women to use those years in fulfilling ways, and society's need for mature judgment and talent have never been greater." California Women, Report of the Advisory Commission on the Status of Women 5 (1971).

decision a New York trial court rejected the challenge of a female plaintiff to a jury system with automatic exemption for women. As a result of this exemption, women constituted less than twenty percent of the available jury pool. In his published opinion, the judge relied on *Hoyt* to explain to the complainant that she was "in the wrong forum." Less chivalrous than this Court, but more accurately reflecting the impact of the stereotype, the judge stated that plaintiff's "lament" should be addressed to her sisters who prefer "cleaning and cooking, rearing of children and television soap operas, bridge and canasta, the beauty parlor and shopping, to becoming embroiled in plaintiff's problems. . . ." *DeKosenko v. Brandt*, 313 N.Y.S. 2d 827, 830 (Sup. Ct. 1970). Nothing was said of the likelihood that many men would find other pursuits preferable to jury service were they offered automatic exemption.

Although *Hoyt* no doubt has impeded full recognition throughout the country that jury duty is a responsibility shared equally by all citizens, male and female alike,⁴⁹ the majority of states either treat women and men on the same basis, or relieve women only when family duties in the particular case require exemption.⁵⁰ For example recognizing the contemporary reality that among today's young

⁴⁹ See *Alexander v. Louisiana*, 255 La. 941, 233 So. 2d 891 (1970), cert. granted, March 1, 1971.

⁵⁰ The Library of Congress Legislative Reference Service, American Law Division, reported to the Senate on June 10, 1970, the results of a search of the laws of the fifty states concerning women as jurors on state juries. At the time of the survey, 26 states provided no female exemptions and two states exempted all "persons" responsible for the care of children. The remaining states displayed a range of female exemptions, from the Ohio provision exempting nurses and nuns (Page's Ohio Rev. Code Ann. §2313.34) to the Louisiana provision excluding all women who do not file with the

parents, child care functions are often shared, the New Jersey statute provides exemption for any "person" who has the actual physical care and custody of a minor child. N.J.S.A. 2A:69-1, 2(g). See also Rev. Codes of Montana §93-1304(12) (exemption for "person" caring directly for one or more children).

D. The Discrimination Against Women Mandated by Sec. 15-314 Is Not Justified by Any Compelling State Interest.

If, as appellant urges, sex-based classification is declared "suspect," this Court must next consider whether a compelling state interest justifies the discrimination embodied in Sec. 15-314 of the Idaho Code.

Section 15-314 is the direct descendant of Sec. 52 of the Idaho Probate Practice Act adopted by the First Territorial Legislature in 1864. The current provision incorporates the language of its 1864 predecessor without change. S.L. 1864, sec. 53, p. 335; Rev. Stats. 1887, sec. 5352; Idaho Code Ann. 1901, vol. 3, sec. 4042. Idaho does not publish legislative committee reports or debate proceedings; consequently, no legislative history is available. Indeed, no source for discovering legislative intent exists apart from the decisions by the courts below in this case, the only Idaho case directly in point.⁵¹

court clerk a written declaration of desire to be subject to jury service (L.S.A. R.S. 13:3055). Hearings on S. J. Res. 61 before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2d Sess. 725-27 (1970).

⁵¹ Section 15-314 has been cited in *Miller v. Lewiston Nat'l Bank*, 18 Idaho 124, 108 Pac. 901 (1910); *Miller v. Mitcham*, 21 Idaho 741, 123 Pac. 941 (1912); *Chandler v. Probate Court*, 26 Idaho 173, 141 Pac. 635 (1914). None of these cases dealt with the issue at bar.

The Supreme Court of Idaho justified the statute in these terms:

By I.C. §15-314, the legislature eliminated [an area] of controversy, i.e., if both a man and woman of the same class seek letters of administration, the male would be entitled over the female This provision of the statute is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits as to which of the two or more petitioning relatives should be appointed.

Philosophically it can be argued with some degree of logic that the provisions of I.C. 15-314 do discriminate against women on the basis of sex. However, nature itself has established the distinction and this statute is not designed to discriminate but is only designed to alleviate the problem of holding hearings by the court to determine eligibility to administer. . . . (A. 21a).

It is our opinion that the state has a legitimate interest in promoting the prompt administration of estates and that the statute in question promotes this interest by curtailing litigation over the appointment of administrators. . . . (A. 23a).

Thus, the Idaho Supreme Court explained as a time and decision saving device its tolerance of a patent legislative discrimination against women. The decision below contrasts dramatically with decisions on kindred matters rendered by the West German Federal Constitutional Court, a high court created with the model of the United States Supreme Court in close view. In a leading case, several wives and mothers challenged under the equal pro-

tection principle of the post-World War II West German Constitution, provisions of the German Civil Code (Bürgerliches Gesetzbuch §§1628, 1629 par. 1) declaring "if parents are unable to agree, father decides," and mandating preference to the father as representative of the child. Both Code provisions were declared unconstitutional. BVerfGE 10, 59 (July 29, 1959). While the Idaho Supreme Court was content to rely on considerations of expediency and the legislature's evident conclusion "that in general men are better qualified to act as administrators than are women," the West German Federal Constitutional Court focused on the superior norm. The differences in life styles alleged to exist, and the interest in saving time and sparing court facilities, it declared, are hardly so decisive as to override the fundamental constitutional guarantee of equal protection. The Court expressly rejected the notion that the legislature may introduce discriminations "of women, Jews, members of some political party or religious association" under "reasonable" circumstances. In a subsequent case concerning preference to sons over daughters in agrarian inheritance law, the West German Federal Constitutional Court relegated to the scrap heap of history legal distinctions based on the assumption that men are better equipped than women to manage property. BVerfGE 15, 337 (March 20, 1963).⁵²

⁵² Cf. United Nations Charter preamble, Art. 1, para. 3 (calling for respect for human rights and fundamental freedoms for all persons without distinction as to race, sex, language or religion). For a progress report indicating a pace more rapid than that of the United States, see *The Status of Women in Sweden: Report to the United Nations* (1968). See also *The Emancipation of Man*, address by Mr. Olof Palme, Swedish Prime Minister, at the Women's National Democratic Club, Washington, D. C., June 8, 1970: The public opinion is nowadays so well informed that if a politician should declare that the woman ought to have a different role than the man and that it is natural that she devotes more time to the children he would be regarded to be of the Stone Age.

No doubt promotion of expeditious administration of estates and curtailment of litigation are bona fide state interests. But it is equally plain that the end of expediency cannot be served by unconstitutional means. Surely this Court would find offensive to the Constitution, to "the ethos of our society," and to common sense a fiduciary selection statute that preferred whites to blacks or Christians to Jews. A statute preferring men to women should fare no better. If sex is a "suspect classification," a state interest in avoiding a hearing cannot justify rank discrimination against a person, solely on the ground that she is a female.

Convenience, simplicity and curtailment of litigation, while grand virtues in the administration of public affairs, do not supersede the fundamental right of individuals to even-handed application of governmental action. Thus, such obviously convenient state measures as restricting the ballot to "two old, established parties" (*Williams v. Rhodes*, 393 U.S. 23 (1968)), and denying welfare payments to persons with less than a year's residency in the state (*Shapiro v. Thompson*, 394 U.S. 618 (1969)), did not survive this Court's scrutiny under the equal protection clause.

Williams v. Rhodes and *Shapiro v. Thompson* involved justifications more substantial than expedition. Yet the several reasons offered by the states in those cases, even in combination, were found insufficient to overcome the heavy burden required by this Court.

In *Shapiro v. Thompson*, the state sought to justify its one-year waiting period on seven grounds: (1) as a protective device to preserve the fiscal integrity of the state public assistance programs (394 U.S. at 627); (2) to discourage the influx of poor families in need of assistance

(394 U.S. at 629); (3) to discourage the influx of indigents who would enter the state solely to obtain larger benefits (394 U.S. at 631); (4) to facilitate planning of the welfare budget; (5) to provide an objective test of residency; (6) to minimize the opportunity for recipients fraudulently to receive payments from more than one jurisdiction; (7) to encourage early entry of new residents into the labor force. 394 U.S. at 634.

In *Williams v. Rhodes*, the state asserted that its restrictive election legislation (1) promoted a two-party system in order to encourage compromise and political stability (393 U.S. at 31-32), (2) avoided election of plurality candidates (393 U.S. at 32), (3) allowed those who disagree with the major parties and their policies "a choice of leadership as well as issues" (393 U.S. at 32), and (4) avoided confronting voters with a choice so confusing that the popular will could be frustrated (393 U.S. at 33).

While any of these reasons might be considered "rational," this Court concluded that, even taken together, they were not "compelling." In contrast to the relatively serious reasons asserted to save the Connecticut, Pennsylvania and District of Columbia statutes in *Shapiro v. Thompson*, and the Ohio law in *Williams v. Rhodes*, the justification advanced here by the Idaho Supreme Court—administrative convenience—falls far short of a "compelling" state interest when appraised in light of the interest of the class against which the statute discriminates—an interest in treatment as full human personalities.⁵³ As

⁵³ The convenience argument, with more significant consequences to the fisc than are present in this case, was appropriately dispatched in *Mollere v. Southeastern Louisiana College*, 304 F. Supp. 826 (E.D. La. 1969) (declaring unconstitutional requirement that

this Court said in *Williams v. Illinois*, 399 U.S. 235, 245 (1970), "the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo."

Moreover, even the vaunted convenience afforded by Idaho Code sec. 15-314 is largely illusory. Hearings are avoided only in those cases where an eligible female applicant is challenged by an equally eligible male applicant. But if, for example, four sisters individually sought letters of administration,⁵⁴ the court would have to hold a hearing to select an administrator; if three brothers and one sister each sought appointment, the court would have to hold a hearing—even though the female applicant would be eliminated from the competition.⁵⁵ In any situation in which two or more applicants of the same sex from a class of equal eligibles separately seek letters of administration, a hearing must be held so that the court may issue letters of administration "to the party best entitled thereto." Idaho Code sec. 15-323.

The fact that not all women are denied the right to a hearing or presumed less than competent to administer an

unmarried women under 21 live in state college dormitory when no such requirement was imposed on men) and *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (inheritance tax on certain property when devised by husband to wife, but not when devised by wife to husband, violates equal protection).

⁵⁴ Idaho Code sec. 15-315 permits the appointment of joint administrators, an expedient measure fully consistent with constitutional principle.

⁵⁵ Without regard to Idaho Code sec. 15-314, the sister would be excluded by Idaho Code sec. 15-312 which ranks brothers in class 4 and sisters in class 5. The subordination of sisters to brothers is as unjustified and as unconstitutional as the discrimination challenged here.

estate highlights the invidious discrimination inherent in the statute. A woman may compete on terms of equality whenever her challenger is another woman. If no male equally eligible opposes, the woman will be appointed. Through this device of law-mandated subordination of "equally entitled" women to men, the dominant male society, exercising its political power,⁵⁶ has secured women's place as the second sex.

⁵⁶ Although women were granted the vote over fifty years ago, the legacy of their disenfranchisement is still apparent. Elected or appointed office in this country remains, with sparse exceptions, a male preserve. See Handbook 118-26.

For the levity with which even the judiciary treats women's lack of representation, see *State v. Hunter*, 208 Ore. 282, 287-88, 300 P.2d 455, 457-58 (1956):

We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominantly masculine. That fact is important in determining what the legislature might have had in mind with respect to this particular statute. . . . It seems to us that its purpose, although somewhat selfish in nature, stands out in the statute like a sore thumb. . . . [I]s it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges?

At the time Idaho Code section 15-314 was originally enacted, 1864, women in Idaho lacked the right to vote for members of the legislature.

II.

The statutory classification based on the sex of the applicant established in Section 15-314 of the Idaho Code is arbitrary and capricious and bears no rational relationship to a legitimate legislative purpose.

If the Court concludes that sex is not a suspect classification, appellant urges application of an intermediate test. Attributable in part to decisions of this Court, see pp. 41-53 *supra*, women continue to receive disadvantaged treatment by the law. In answer to the compelling claim of women for recognition by the law as full human personalities, this Court, at the very least, should reverse the presumption of a statute's rationality when the statute accords a preference to males. Rather than require the party attacking the statute to show that the classification is irrational, the Court should require the statute's proponent to prove it rational.

Yet, the discrimination embodied in section 15-314 of the Idaho Code is so patently visible that the statute is readily assailable under the less stringent reasonable-relationship test. The mandatory preference to males lacks the constitutionally required fair and substantial relation to a permissible legislative purpose and therefore must be held to violate the equal protection clause.⁵⁷ *F. S.*

⁵⁷ Contrast with the wholly irrational discrimination embodied in section 15-314 of the Idaho Code, the Louisiana succession statute upheld by this Court in *Labine v. Vincent*, 401 U.S. — (1971). Finding that it was permissible for the Louisiana legislature to distinguish for inheritance purposes between legitimate and illegitimate children, the Justice who cast the deciding vote stressed the different quality of the male parent's relation to legitimate and illegitimate children: "[I]t is surely entirely reasonable for the Louisiana legislature to provide that a man who has entered into

Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); *Gulf, Colorado & S. F. Ry. v. Ellis*, 165 U.S. 150, 155 (1897).

The Idaho Supreme Court held the sex-based classification of section 15-314 reasonable on the ground that "the legislature when it enacted this statute evidently concluded that in general men are better qualified to act as an administrator than are women." Conceding that "there are doubtless particular instances in which [the legislature's evident conclusion] is incorrect," the Idaho Supreme Court was "not prepared to say that [the conclusion] is so completely without a basis in fact as to be irrational and arbitrary" (A. 22a).⁵⁸

Declaring that "nature itself has established the distinction," (A. 21a), the Idaho Supreme Court seemingly justified the discrimination challenged here by finding it "rational" to assume the mental inferiority of women to men. This assumption, particularized in the judgment that "men

a marital relationship thereby undertakes obligations to any resulting offspring beyond those which he owes to the products of a casual liaison. . . ." (Harlan, J., concurring opinion.) By parity of reasoning, it is surely entirely unreasonable for Idaho to provide that a female person who bears the very same relationship to the decedent as does a male person ranks, automatically, as the inferior human being.

⁵⁸ The Idaho Supreme Court observed that "other courts construing similar provisions have also held that the preference is mandatory" (A. 19a-20a). To support this observation, it cited a solitary 1901 California case, *In re Coan's Estate*, 132 Cal. 401, 64 P. 691. That case is no longer law. California long ago repealed its male preference provision. See California Probate Law secs. 422, 423. If the Idaho Supreme Court wished to determine California's present view, it might have consulted *In re Estate of Legatos*, 1 Cal. App. 3d 657, 81 Cal. Rptr. 910 (1969) (inheritance tax on certain property when devised by husband to wife, but not when devised by wife to husband, violates equal protection).

are better qualified to act as an administrator than are women" demands swift condemnation of this Court. In the Idaho District Court, where the argument was made in terms of the supposed greater "business experience" of men, Judge Donaldson responded, "The Court feels that this statement has no basis in fact in this modern age and society" (A. 14a), and promptly declared section 15-314 unconstitutional. At a time when assumptions concerning the physical inferiority of women no longer go unquestioned,⁵⁹ the Court surely cannot countenance distinctions based on totally unfounded assumptions of differences in mental capacity, or "experience" relevant to the office of administrator.⁶⁰

Despite the massive discrimination that women still face in the job market, their participation in the business world is increasing dramatically. In 1969, 30,512,000 women over the age of sixteen were at work, and comprised 37.8% of

⁵⁹ See, e.g., *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Rosenfeld v. Southern Pacific Co.*, — F.2d — (9th Cir. 1971); *Cheatwood v. South Central Bell Telephone & Telegraph Co.*, 303 F. Supp. 754 (M.D. Ala. 1969); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969); Note, *The Mandate of Title VII of the Civil Rights Act of 1964: To Treat Women as Individuals*, 59 Georgetown L. Rev. 221 (1970).

⁶⁰ While the office of administrator may not constitute "employment" within the meaning of federal and state anti-discrimination laws, it does require work and carries a fee. It would be strange indeed if state appointments of fiduciary officers were exempt from the standards of nondiscrimination declared national policy and imposed on private employers. See *Schattman v. Texas Employment Commission*, Civ. Action A-70-CA-75, W.D. Texas (Austin Division), order denying motion for relief from judgment, April 16, 1971 ("Private employers can hardly be expected to comply voluntarily with the law when the state . . . operates in open disregard of the national policy of nondiscrimination.").

all workers.⁶¹ The comparable figures thirty years ago were 13,783,000 and 25.4%.⁶² About 42% of all women over the age of sixteen work full-time the year round.⁶³ In 1969, 58.9% of all married women living with husbands worked.⁶⁴ The Department of Labor has projected that by 1980 there will be 37,000,000 working women, twice as many as there were in 1950, and that for the first time there will be as many female professionals and technical workers as female blue-collar workers.⁶⁵

A similar trend is apparent in education. In 1967, women comprised 40.5% of the undergraduate student population in four year institutions of higher learning and 29.7% of the graduate population.⁶⁶ In the same year, women earned 40.3% of the bachelor's degrees, 34.7% of the master's degrees, and 11.9% of the doctorate degrees.⁶⁷

⁶¹ Dept. of Labor, Women's Bureau: Background Facts on Women Workers in the United States 5 (1970) [hereinafter Background Facts].

⁶² Handbook 10.

⁶³ Handbook 3.

⁶⁴ Background Facts 8. The Labor Department reported that in 1970, four out of every 10 husbands in the United States had wives who were employed. The ratio of working wives compared with an overall figure of 3 out of 10 a decade ago. See New York Times, January 31, 1971, p. 45.

⁶⁵ See New York Times, November 11, 1970, p. 32, col. 1 (report of Secretary of Labor James D. Hodgson news conference presenting major conclusions of Department of Labor Study, "United States Manpower in the Nineteen-Seventies").

⁶⁶ Handbook 188.

⁶⁷ *Id.* at 191. On obstacles confronting women in academic life and measures proposed at one institution "to create a climate in which prejudice against women, or apathy toward their presence . . . will be hard to maintain," see Report of the Committee on the Status of Women in the Faculty of Arts and Sciences (Harvard University 1971).

Close to 3,000,000 women were enrolled in institutions of higher learning in 1967, representing a 10% increase over 1966 and a 53% increase over 1963.⁶⁸

In April, 1971, 4,500,000 women were employed as professional or technical workers compared to 6,706,000 men; 1,440,000 women were employed as managers, officials or proprietors, compared to 7,150,000 men.⁶⁹ In 1968, 10,000 women worked as accountants, 20% of the total; 12,500 were employed as bank officers, 10% of the total; 8,100 were employed as lawyers, 3% of the total; 6,500 worked as mathematicians, 10% of the total; and 7,650 were engaged as statisticians, 33% of the total.⁷⁰

In 1970, 2,226 women passed the federal service management intern examination, 38% of the total.⁷¹ Women employed by the federal government as category III employees in 1969 included 5,481 in accounting and budget, 12% of the total; 5,621 in legal and law-related areas, 23% of the total; 6,686 in business and industry, 14% of the total.⁷² As of April 1971, 13,000 women were serving as officers in the Armed Forces.⁷³

⁶⁸ *Id.* at 187.

⁶⁹ Dept. of Labor, Bureau of Labor Statistics: *Employment and Earnings* 44 (May 1971). Cf. M. Hennig, *What happens on the way up*, *The MBA* 8-10 (March, 1971).

⁷⁰ Dept. of Labor, Bureau of Labor Statistics: *Occupational Outlook Handbook Bulletin No. 1650*, pp. 28, 789, 230, 127, 129 (1970-71 ed.).

⁷¹ Civil Service Commission, Bureau of Recruiting and Examining, Program Development Division (unpublished data).

⁷² Civil Service Commission, Bureau of Manpower Information Systems: *Study of Employment of Women in the Federal Government* 137, 141 (1969).

⁷³ Office of the Assistant Secretary of Defense, Manpower and Reserve Affairs (unpublished data).

Any legislative judgment that "men are better qualified to act as an administrator than are women" is simply untenable in view of these statistics, revealing what the Department of Labor describes as "a major change in American life style."⁷⁴ Moreover, although the Idaho Supreme Court did not provide any enlightenment on the specific functions an administrator performs for which "men are better qualified," the standard responsibilities are evident: receiving payments from creditors, paying out debts, paying state and federal taxes if any, preserving the assets of the estate, and finally paying out the net estate to the lawful heirs. Except for the occasional millionaire who dies intestate, the responsibilities are hardly onerous. They can be handled satisfactorily by most people who have completed secondary school education.⁷⁵

Moreover, the extent to which "business experience" is needed for performance of the duties of an administrator is questionable. The Idaho Code, like most statutes relating to administration, confers very limited authority upon the administrator and empowers the court to supervise the estate closely during the entire period of administration. Thus the administrator must hire an appraiser for the estate. Idaho Code sec. 15-401, 402. No claims can be allowed without court approval. Idaho Code sec. 15-607. Distribution of the estate is strictly prescribed. Idaho Code sec. 15-1301-15-1308. Furthermore, the criteria for disqualification of an administrator set out in Idaho Code sec. 15-317 provide no support whatever for treating "business

⁷⁴ See New York Times, November 11, 1970, p. 32, col. 3.

⁷⁵ As of March 1968, apart from those who went on to higher education, 38.2% of the female population had completed four years of high school while only 30.6% of the male population were high school graduates. Handbook 178.

experience" as a characteristic of the competent executor. Any resident above the age of majority who has not been convicted of an infamous crime, and who is not mentally defective, a drunk, a wastrel, a spendthrift, or a cheat, is presumptively competent.⁷⁶

In any event, it is not unlikely that more women than men have the kind of "business experience" most relevant to the duties of an administrator. Women who do not work outside the home often handle most if not all the financial affairs of their family unit. Managerial responsibility, including the settlement of accounts and the preservation of property, is a central part of their daily occupation. As preparation for the duties of an administrator, experience in household management surely is not inferior to experience in such typically male occupations as truck driver, construction worker, factory worker, or farm laborer.⁷⁷

Finally, as developed in the preceding section (*supra*, pp. 53-58), Idaho's interest in prompt administration of estates and curtailment of litigation is barely served by section 15-314. The male preference system operates in

⁷⁶ The primary criterion reflected in the Idaho statutes is not worldly experience but the degree of kinship to the decedent. Preference is given to the person with the greatest interest in the estate on the reasonable assumption that he or she will be motivated to preserve the property with due care during the period of administration.

⁷⁷ If the Idaho legislature was in fact motivated by the misguided assumption that men are better qualified than women to administer an estate, the scheme it adopted would delight Lewis Carroll. Within a family unit, the death most likely to occur first is the father's. But when husband predeceases wife, Idaho Code sec. 15-312 provides that in appointing an administrator, first priority goes to the widow.

relatively few cases. In most situations in which more than one applicant from a class of equal eligibles separately seek letters of administration, hearings must be held. Indeed, and quite appropriately, the Idaho Code invites hearings by providing that "any person interested" may challenge the competency of the administrator. Idaho Code 15-322.⁷⁸

To eliminate women who share an eligibility category with a man, when there is no basis in fact to assume that women are less competent to administer than are men, is patently unreasonable and constitutionally impermissible. A woman's right to equal treatment may not be sacrificed to expediency.

⁷⁸ Recently, this Court reasserted the fundamental principle that "a State must afford to all individuals a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. — (1971).

CONCLUSION

For the reasons stated above, the decision of the Idaho Supreme Court should be reversed and Sec. 15-314 should be declared unconstitutional.

Respectfully submitted,

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APPENDIX

Section 15-314 of the Idaho Code, and the justification offered for it by the Idaho Supreme Court, assume, Orwellian fashion, this fundamental principle: *All people are equal, but male people are more equal than female people.* Lawmakers in other states similarly ascribe inferior status to the female sex. This appendix presents only a small sample of current legislative prescriptions, kin to Section 15-314 of the Idaho Code.

1. *Persons entitled to administer the estate of a person dying intestate: mandatory preference to males*

- a) *District of Columbia*

D.C. Code Ann. § 20-334 (1937): Persons entitled to administer; order of preference

(a) The Probate Court may grant letters of administration of the estate of a person dying intestate to one or more of the following persons according to the order of preference indicated:

(1) where there is a surviving spouse and a child or children, to the surviving spouse or to the child, or one or more of the children qualified to act as administrator;

• • • • •

(3) where there is no surviving spouse, or child, or grandchild to act, the father shall be preferred; and, where there is no father, the mother shall be preferred;

• • • • •

(5) males shall be preferred to females in equal degree;

• • • • •

(9) a *feme sole* shall be preferred to a married woman in equal degree;

• • • • •

b) *Nevada*

Nev. Rev. Stat. § 139.060 (1969): Males preferred to females; whole blood and half blood.

When there shall be several persons claiming and equally entitled to the administration, males shall be preferred to females, and relatives of the whole blood to those of the half blood.

c) *South Dakota*

S.D. Code Ann. § 30-9-3 (1967): Males preferred in appointment—Relatives of whole blood.

Of several persons claiming and equally entitled to administer, males must be preferred to females, and relatives of whole blood to those of the half blood.

2. *Persons entitled to administer the estate of a person dying intestate: brothers must be preferred to sisters*

a) *Arizona*

Ariz. Rev. Stat. Ann. § 14-417 (1956): Appointment of administrator; order of preference

(A) Administration of the estate of a person dying intestate shall be granted to one or more of the following persons, and in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed.

2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.

• • • • •

b) *Idaho*

Idaho Code § 15-312 (1948): Priorities in right of administration.

Administration of the estate of a person dying intestate must be granted to someone or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

1. The surviving husband or wife or some competent person whom he or she may request to have appointed.
2. The children.
3. The father or mother.
4. The brothers.
5. The sisters.
6. The grandchildren.

• • • • •

c) *Nevada*

Nev. Rev. Stat. § 139.040 (1969): Order of priority of right to letters; priority of nominee.

1. Administration of the estate of a person dying intestate shall be granted to some one or more of the persons

hereinafter mentioned, and they shall be respectively entitled in the following order:

- (a) The surviving husband or wife.
- (b) The children.
- (c) The father or the mother.
- (d) The brother.
- (e) The sister.
- (f) The grandchildren.

• • • • •

d) *South Dakota*

S.D. Code Ann. § 30-9-1 (1967): Persons entitled to administer—Order of preference.

Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

- (1) The surviving husband or wife, or some competent person whom he or she may request to have appointed;
- (2) The children;
- (3) The father or mother;
- (4) The brothers;
- (5) The sisters;
- (6) The grandchildren.

• • • • •

e) *Wyoming*

Wyo. Stat. Ann. § 2-93 (1957): Persons entitled to administer.

Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are, respectively, entitled thereto in the following order:

1. The surviving husband or wife, or some competent person whom he or she may request to have appointed;
2. The children;
3. The father or mother;
4. The brothers;
5. The sisters;
6. The grandchildren.

• • • • •

3. *Persons entitled to administer the estate of a person dying intestate: mandatory disqualification of married women*

a) *Utah*

Utah Code Ann. § 75-4-5 (1953): Competency of married women.

When objection is made by any person interested in an estate, a married woman must not be appointed administratrix. When an unmarried woman appointed adminis-

tratrix marries, the court may, upon the motion of any such interested person, revoke her authority and appoint another person in her place.

4. *Parental power; guardian of minor child or property of minor child: mandatory preference to father*

a) *Alabama*

Ala. Code tit. 21, § 3 (1958): Father entitled to preference; guardian's control of ward.

When the minor has an estate in his own right, a guardian must be appointed for him; and his father, if a suitable and proper person, and willing to give bond and qualify as guardian, is entitled to a preference. * * *

b) *District of Columbia*

D.C. Code § 21-107 (1967): Preferences in appointment of guardian of estate

In appointing a guardian of the estate of an infant
* * * the court shall give preference to—

(1) the father, if living; or

(2) if he is dead, then to the mother, if living; or

(3) if the infant is a married female, to her husband—when in the judgment of the court the parent or husband is a suitable person to have the management of the infant's estate.

c) *Georgia*

Ga. Code Ann. § 74-108 (1933): Parental power.

Until majority, the child shall remain under the control of the father, who is entitled to his services and the proceeds of his labor.

Ga. Code Ann. § 49-102 (Supp. 1970): Natural guardian; bond.

The father, if alive, unless otherwise provided herein, is the natural guardian; if the father is dead or if the father is not domiciled with the mother, the parent having custody of the child is the natural guardian. • • •

d) *Louisiana*

La. Civ. Code Ann. art. 264 (1952): Of the Tutorship by the Effect of the Law—Male preference

In case there shall be more than one ascendant in the same degree, in the direct line, but of different sexes, the tutorship shall be given to the male.

La. Civ. Code Ann. art. 266 (1952): Of the Tutorship by the Effect of the Law—Grandmother

The grandmother of the minor is *the only woman* who has a right to claim the tutorship by the effect of the law, but she is not compelled to accept it. (Emphasis added.)

e) *New Mexico*

N.M. Stat. Ann. § 32-1-1 (1953): Parents natural guardians of children—Guardianship of property.

The father, and, in case of his death or abandonment of his family, the mother, shall be the natural guardians of their children, and shall have the care of their persons and education; • • •

N.M. Stat. Ann. § 32-1-2 (1953): Preferred right of father or mother to serve as guardian.

In all cases where application is made either to the probate or the district courts of this state for the appointment

of a guardian for the care and management of the estate of any minor the father of such minor, and in case of his death or abandonment of his family, the mother of such minor, or in case of the divorce or legal separation, the parent having custody of such minor, shall have the preferred right to be appointed as such guardian unless such parent shall waive such right or unless it shall be shown that such parent is not a fit and competent person to be appointed as such guardian.

f) *North Dakota*

N.D. Cent. Code Ann. § 30-10-13 (1960): When father or mother entitled to guardianship.

If the father of a minor is living and is competent to transact his own business and is not otherwise unsuitable, he is entitled to the guardianship of the minor. In case of his death, the mother, if a competent and proper person, is entitled to the guardianship.

5. *Married women's right to engage in independent business: special qualifications imposed*

a) *California*

Cal. Civ. Proc. Code § 1811 (Deering 1966): Who may become sole trader.

A married woman may become a sole trader by the judgment of the superior court of the county in which she has resided for six months next preceding the application.

Cal. Civ. Proc. Code § 1812 (Deering 1966): Notice: How given and what to contain

A person intending to make application to become a sole trader must publish notice of such intention in a newspaper

published in the county, or if none, then in a newspaper published in an adjoining county, pursuant to Gov't Code Section 6064. The notice must specify the day upon which application will be made, the nature and place of the business proposed to be conducted by her, and the name of her husband.

Cal. Civ. Proc. Code § 1813 (Deering, Supp. 1971): Petition, what to contain and when filed

Ten days prior to day named in the notice, the applicant must file a verified petition, setting forth:

1. The justification for application.
2. The nature of the business proposed to be conducted, and the capital to be invested therein, if any, and the sources from which it is derived.
3. That the application is not made to defraud, delay, or hinder any creditor or creditors of the husband of the applicant.

Cal. Civ. Proc. Code § 1814 (Deering 1966): May have five hundred dollars of community or husband's property

The applicant may invest in the business proposed to be conducted, a sum derived from the community property or of the separate property of the husband, not exceeding five hundred dollars.

Cal. Civ. Proc. Code § 1817 (Deering 1966): Decree, when it must be

If the facts sustain the petition, the court must render judgment, authorizing the applicant to carry on, in her own name and on her own account, the business specified in the notice and petition.

b) *Massachusetts*

Mass. Gen. Laws Ann. ch. 209, § 10 (1955): Separate Business Certificate.

If a married woman does or proposes to do business on her separate account, she shall cause to be recorded in the clerk's office of the city or town where she does or proposes to do such business a certificate stating her name and that of her husband, the nature of the business and the place where it is or is proposed to be carried on . . . If such certificates are not so recorded by either husband or wife, the personal property employed in such business shall be liable to be attached as the property of the husband and to be taken on execution against him, and the husband shall be liable upon all contracts lawfully made in the prosecution of such business in the same manner and to the same extent as if such contracts had been made by him.

c) *Nevada*

Nev. Rev. Stat. § 124.010 (1957): Right of married woman to conduct business under her own name as sole trader.

Any married woman shall have the right to carry on and transact business under her own name, and on her own account, by complying with the regulations prescribed in this chapter.

Nev. Rev. Stat. § 124.20 (1957): Application to conduct business in wife's own name: Notice, hearing and order.

1. Any married woman residing within this state, desiring to avail herself of the benefit of this chapter, shall give notice thereof by advertising in some public news-

paper published in the county in which she has resided for 4 successive weeks preceding her application. • • •

2. The notice shall set forth: • • •

3. • • •

If it appear to the court that a proper case exists, it shall make an order, which shall be entered on the minutes, that the applicant be authorized to carry on, in her own name and on her own account, the business, trade, profession or art named in the notice. The insolvency of the husband, apart from other causes tending to prevent his supporting his family, shall not be deemed to be sufficient cause for granting the application.

• • • • •

Nev. Rev. Stat. § 124.030 (1957): Rights and liabilities of sole traders.

After the order has been duly made and recorded, as provided in NRS 124.020, the person named shall be entitled to carry on the business in her own name, and the property, revenues, moneys and credits so invested shall belong exclusively to the married woman, and shall not be liable for any debts of her husband. The married woman shall be allowed all the privileges, and be liable to all legal process, now or hereafter provided by law, against debtors and creditors, and may sue and be sued alone, without being joined with her husband. But nothing contained in this chapter shall be deemed to authorize a married woman to carry on business in her own name when the same is managed or superintended by her husband.

d) *Pennsylvania*

Pa. Stat. Ann. tit. 48, § 41 (1965): Wives of absent mariners declared feme sole traders; actions; execution

Where any mariners or others are gone, or hereafter shall go, to sea, leaving their wives at shop-keeping, or to work for their livelihood at any other trade in this province, all such wives shall be deemed, adjudged and taken, and are hereby declared to be, as feme sole traders, and shall have ability and are by this act enabled, to sue and be sued, pleaded and be impleaded at law, in any court or courts of this province, during their husbands' natural lives, without naming their husbands in such suits, pleas or actions: * * *

Pa. Stat. Ann. tit. 42, § 42 (1965): Married women to have rights of feme sole traders on husband's desertion

Whensoever any husband, from drunkenness, profligacy or other cause, shall neglect or refuse to provide for his wife, or shall desert her, she shall have all the rights and privileges secured to a feme sole trader, * * * and be subject as therein provided, and her property, real and personal, howsoever, acquired, shall be subject to her free and absolute disposal during life, or by will, without any liability to be interfered with or obtained by such husband, and in case of her intestacy shall go to her next of kin, as if he were previously dead.

Pa. Stat. Ann. tit. 48, § 43 (1965): Proceedings to declare wife a feme sole trader

That creditors, purchasers and others, may with certainty and safety, transact business with a married woman under the circumstances aforesaid, she may present her

petition to the court of common pleas of the proper county • • •

Pa. Stat. Ann. tit. 48, § 44 (1965): Wife not supported by, or living apart from, husband to be declared feme sole trader

Whenever a husband and wife reside together under the same roof, and the husband has failed to support his wife or family for a period of five years or more, although there is no desertion, or whenever a husband and wife live apart and separate for one year or more, and all marital relations between them have ceased, and the husband, for one year or more, has not supported his wife, nor their child or children, if any they have, from the time of the separation of the husband and wife, and the wife and child, or children, if any there are, are maintained either by the wife, by the joint efforts of the wife and children, by the children, or from the income of the wife's separate estate, then, in either such case, the wife may petition the court of common pleas of the county in which she resides to be decreed a feme sole trader; • • •

6. *Limitations on capacity of married woman to become surety or guarantor*

a) *Georgia*

Ga. Code Ann. § 53-503 (Supp. 1970): Wife feme sole as to her separate estate; binding separate estate.

The wife is a feme sole as to her separate estate, unless controlled by the settlement. Every restriction upon her power in it must be complied with. The wife may not bind that portion of her separate estate which is composed of tangible personal property by any contract of suretyship

or by any assumption of the debts of her husband. The sale of any portion of her separate estate which is composed of tangible personal property to a creditor of her husband in extinguishment of his debts shall be absolutely void.

b) *Kentucky*

Ky. Rev. Stat. Ann. § 404.010(2) (1969): Effect of marriage on wife's property; separate estate; subjection of estate to debts.

A married woman shall never be the joint maker of a note or a surety on any bond or obligation of another, other than her husband, without the joinder of her husband with her in making such contract unless her separate estate has been set apart for that purpose by mortgage or other conveyance. • • •

7. *Women and children: birds of a feather*

a) *California*

Cal. Pen. Code § 415 (Deering 1960): Disturbing the peace: Horse racing or shooting in unincorporated town: Profanity: Punishment.

Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, by tumultuous or offensive conduct, • • • or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor • • •

Cal. Pen. Code § 880 (Deering 1961): Infants and married women may be required to give security.

Infants and married women, who are material witness(es) against the defendant, may be required to procure sureties for their appearance, as provided in the last section. [Enacted 1872]

8. *Marriageable age: men, but not women, require time for education and preparation for labor or business*

a) *Alabama*

Ala. Code tit. 34, § 4 (1958): What minor incapable of marriage.

A man under the age of seventeen, and a woman under the age of fourteen years are incapable of contracting marriage.

Ala. Code tit. 34, § 10 (1958): When consent of parents and bond required.

If the man intending to marry be under twenty-one, and the woman under eighteen years of age, and have not had a former wife or husband, the judge of probate must require the consent of the parents or guardians of such minors to the marriage * * *

b) *New Jersey*

N.J. Stat. Ann. § 37:1-6 (1968): Consent of parents or guardian of minor; when required.

A marriage license shall not be issued to a minor under the age of twenty-one years, if a male, or under the age of eighteen years, if a female * * *

c) *Wisconsin*

Wisc. Stat. Ann. § 245.02 (Supp. 1970): Marriageable age; who may contract

(1) Every male person who has attained the full age of 18 years and every female person who has attained the full age of 16 years shall be capable in law of contracting marriage if otherwise competent.

• • • • •

9. *Domicile; head of family: home is where he makes it*

a) *California*

Cal. Gov't Code § 244 (Deering, Supp. 1971): Determination of place of residence.

In determining the place of residence the following rules are to be observed:

• • • • •

(d) The residence of the father during his life, and after his death the residence of the mother, while she remains unmarried, is the residence of the unmarried minor child, provided that when the parents are separated, the residence of the parent with whom an unmarried minor child maintains his place of abode is the residence of such unmarried minor child.

(e) The residence of the husband is the residence of the wife, provided that a married woman who is separated from her husband may establish her own residence.

b) *Georgia*

Ga. Code Ann. tit. 79, § 403 (1933): Feme covert.

The domicile of a married woman shall be that of her husband, except in two cases: 1. Of voluntary separation and living apart. 2. Of a pending application for divorce. In either case her domicile shall be determined as if she were a feme sole.

c) *Idaho*

Idaho Code Ann. § 32-902 (1948): Head of family.

The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.

d) *Louisiana*

La. Civ. Code art. 39 (1952): Married women; minors and interdicts

A married woman has no other domicile than that of her husband; * * *

La. Civ. Code art. 120 (1952): Obligation of living together

The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obligated to receive her and to furnish her with whatever is required for the convenience of life, in proportion to his means and condition.

e) *Montana*

Mont. Rev. Code Ann. § 21-113 (1947): Husband may select home.

The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion.

Mont. Rev. Code Ann. § 36-102 (1947): Rights of husband as head of family.

The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

Mont. Rev. Code Ann. § 83-303 (33) (1947): Residence, rule for determining.

Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

• • • • •

5. The residence of the husband is presumptively the residence of the wife.

• • • • •

f) *New Mexico*

N.M. Stat. Ann. § 57-2-2 (1953): Rights of husband.

The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

g) *North Dakota*

N.D. Cent. Code § 14-07-02 (1960): Head of family.

[The husband] may choose any reasonable place or mode of living and the wife must conform thereto.

N.D. Cent. Code § 54-01-26 (Supp. 1969): Residence—Rules for determining.

Every person has in law a residence. In determining the place of residence the following rules shall be observed:

• • • • •

4. The residence of the father during his life, and after his death, the residence of the mother, while she remains unmarried, is the residence of the unmarried minor children;

5. The residence of the husband is presumptively the residence of the wife except in the case of establishing residence for voting purposes;

• • • • •

h) *Ohio*

Ohio Rev. Code Ann. § 3103.02 (Page's 1960): The head of the family.

The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.

i) *Oklahoma*

Okla. Stat. Ann., tit. 32, § 2 (1958): Husband head of family.

The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.

j) *Wisconsin*

Wisc. Stat. Ann. § 49.10 (Supp. 1970): Legal settlement; how determined

(1) A wife has the settlement of her husband, if he has any within the state, but if he has none, she has none. A wife living separate from her husband shall, if criminal proceedings have been instituted under § 52.05, or support proceedings commenced under § 52.10, begin to acquire legal settlement in her own right as of the date of instituting the criminal proceedings or commencing the support proceedings.

• • • • •

IN THE
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v.

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CLAUDE ALEXANDER, *Petitioner*,

v.

STATE OF LOUISIANA, *Respondent*.

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS
CURIAE* AND BRIEF *AMICUS CURIAE* OF THE
NATIONAL FEDERATION OF BUSINESS AND PRO-
FESSIONAL WOMEN'S CLUBS, INC.**

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Women's Clubs, Inc.*

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STATE OF LOUISIANA, *Respondent*.

**MOTION FOR LEAVE TO FILE BRIEF
*AMICUS CURIAE***

The National Federation of Business and Professional Women's Clubs, Incorporated, hereby respectfully moves for leave to file the attached brief *amicus curiae* in these cases. The consent of both attorneys of record has been received in *Alexander v. Louisiana*. In *Reed v. Reed* the consent of the attorney for the Petitioner has been received, and the consent of the attorney for the Respondent was requested but refused. Neither case has yet been set for oral argument, and Respondent's brief in *Reed v. Reed* is not due to be filed until September 7, 1971. Therefore, *amicus* respectfully submits that granting of this motion will not cause

hardship to any of the parties or delay the resolution of the causes.

The interest of the National Federation of Business and Professional Women's Clubs in these cases arises from the fact that they squarely present the issue of the degree to which the Equal Protection Clause of the Fourteenth Amendment guarantees equality of treatment for women under the law. One of the primary policy objectives of the Federation, which has approximately 180,000 members and is open to all working women, has been to eradicate laws and practices that perpetuate invidious sex discrimination. It is believed that the brief which *amicus curiae* is requesting permission to file will contain a more complete argument on the constitutional issue and a fuller description of the factual background surrounding these cases than any of the other briefs. If this argument is accepted, it would be dispositive of these cases.

Respectfully submitted,

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**BRIEF *AMICUS CURIAE* OF THE NATIONAL
FEDERATION OF BUSINESS AND PRO-
FESSIONAL WOMEN'S CLUBS, INC.**

INTEREST OF *AMICUS*

The National Federation of Business and Professional Women's Clubs, Inc. (hereinafter referred to as BPW), is a nationwide non-partisan organization dedicated to promoting the interests of business and professional women. It is a federation composed of 53 state federations, which in turn are composed of 3,800 local clubs. These clubs are in operation in every state of the United States as well as in the District of Columbia, Puerto Rico, and the Virgin Islands. The BPW has approximately 180,000 members.

Membership is open to any working woman, and the Federation's membership includes secretaries, lawyers, assembly line workers, clerks, and in short, women engaged in virtually every occupation.

In its 52 year existence, the BPW has been particularly concerned with securing equality of treatment for women under the law. One of its primary policy objectives is to eradicate laws and practices that perpetuate invidious sex discrimination in violation of the guarantee of Equal Protection of the Laws. The BPW has long been a supporter of the proposed Equal Rights Amendment to the United States Constitution, and has testified on behalf of its adoption before both the House and Senate Committees on the Judiciary. As an advocate of the strict enforcement of the sex discrimination prohibition of Title VII of the Civil Rights Act of 1964, BPW filed an *amicus* brief in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

The cases at bar involve the direct application of the Equal Protection Clause of the Fourteenth Amendment to State laws which patently discriminate against women on the basis of sex. The proper application of the Equal Protection Clause is of immediate and substantial importance to the BPW, to the purposes which it endeavors to serve, and to women throughout the United States.

STATEMENT OF FACTS

Both cases at bar involve constitutional challenges under the Fourteenth Amendment to State laws that systematically exclude women from the full and equal exercise of certain rights because of sex.

In *Reed v. Reed*, No. 70-4 appellant, as the mother of an intestate decedent, filed her petition for probate of the estate. Decedent's father, appellee herein, also petitioned for letters of administration. Both parties were equally entitled to letters of administration under § 15-312, Idaho Code. The probate judge ruled in favor of the father on the

grounds that § 15-314, Idaho Code, required that males must be preferred to females as between persons equally entitled to administer an estate. The probate court order was reversed by the Fourth Judicial District Court of Idaho which held that I.C. § 15-314 violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Idaho Supreme Court, reversing the district court, upheld the constitutionality of I.C. § 15-314.

In *Alexander v. Louisiana*, No. 70-5026, petitioner's conviction by the District Court for the 15th Judicial District in Lafayette Parish, Louisiana, was affirmed on appeal by the Supreme Court of Louisiana. Petitioner challenged the validity of the original indictment on the ground, among others, that women were systematically excluded from the grand jury list and venire and from the grand jury empaneled. The evidence below established that women were totally excluded from juries in Lafayette Parish because of the operation of Article 402, Louisiana Code of Criminal Procedure, which prohibits the selection of a woman unless she has filed a written declaration of her desire to serve. The Supreme Court of Louisiana rejected petitioner's challenge to the grand jury venire, relying on *Hoyt v. Florida*, 368 U.S. 57 (1961), to uphold the exclusion of women. Petitioner contends that the indictment against him was invalid and illegal because it was returned by a grand jury empaneled from a venire made up in violation of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT

Sex discrimination is a massive affront to our fundamental concepts of equality. It imposes a massive psychological and economic burden on American society. In those areas in which the costs can be documented—for example, average annual income—and in its immeasurable impact on personal dignity, sex discrimination may well take an even greater toll than racial discrimination.

Much of the discrimination stems directly from State action. Federal, State, and local governments employ more than 20% of the labor force, and their practices are followed by many other employers. Despite the fact that these institutions ought to serve as a model of nondiscriminatory employment, available studies indicate that women are relegated almost exclusively to the lowest grades of government service. State action in the area of education shows a clear and persistent pattern of discrimination against women, both in admissions and in access to teaching and supervisory positions. Some States continue to discriminate against women in their criminal laws. The vast majority of States continue to enforce archaic laws—"protective" labor legislation, limitations on the right to contract and the right to enter business, and so forth—which severely restrict women who wish to advance and earn promotions in their work.

This Court has never struck down any law on the ground that it denied the Equal Protection of the Laws to either sex. Instead, in a line of cases beginning in 1872, the Court has determined that State action fostering or permitting sex discrimination is constitutionally permissible if it appeared "reasonable"—and the Court has found every instance of sex discrimination with which it has been presented to be "reasonable." As a result of these cases, the Equal Protection Clause has been effectively rendered a nullity as far as sex discrimination is concerned.

Today there is increasing recognition in all parts of our society that it is neither constitutionally permissible nor morally justifiable to subject the majority of our population to second class status. Employment opportunities have been expanded under decisions construing the sex-discrimination provisions of Title VII of the 1964 Civil Rights Act. In addition to action in the courts, there has been substantial action in State legislatures and by State Attorneys General, important changes in private institutions and customs, and even increased pressure for fundamental constitutional change—all directed at the problem of sex discrimination in

our society. Moreover, a number of courts have challenged the wisdom of—and in some cases effectively overruled—this Court's earlier decisions in cases directly attacking the constitutionality of State laws discriminating on the basis of sex. These cases implicitly—and on occasion explicitly—reject the premises on which this Court's earlier decisions rested.

At the same time, a series of Supreme Court cases has struck down other forms of personal discrimination by requiring that all such discrimination be "subject to the most rigid scrutiny" under the Equal Protection Clause. The Court has recognized that when "fundamental" and "individual and personal" rights are involved, "strict scrutiny" must be exercised by the courts lest such important rights be abridged or infringed. This standard of review has been used by the Court to overturn discrimination in voting power, discrimination against aliens, discrimination against the poor, and most importantly, instances of racial discrimination.

Women, too, are entitled to Equal Protection of the Laws under the Fourteenth Amendment. Sex discrimination has as substantial an adverse impact on our society as the other forms of discrimination which this Court has struck down. Women have as great a claim to the benefits of the Equal Protection Clause as do aliens, indigents, and members of racial minorities. The same premises of human dignity and fundamental equality that give rise to the Fourteenth Amendment demand that its full protection be extended to strike down discrimination on account of sex.

In the cases at bar, both the Idaho law which automatically prefers males over females in the administration of estates, and the Louisiana law under which women are effectively precluded from jury service discriminate entirely on the basis of sex, without regard to the personal capabilities or circumstances of the individuals involved. Accordingly, neither can survive the "most rigid scrutiny" mandated by the Equal Protection Clause of the Fourteenth Amendment, and both decisions below should be reversed.

ARGUMENT

I

**SEX DISCRIMINATION IS A MASSIVE AFFRONT TO
FUNDAMENTAL HUMAN LIBERTY AND DIGNITY,
WITH PERVASIVE AND DEMONSTRABLE ADVERSE
IMPACT ON OUR SOCIETY.**

The evidence is overwhelming that persistent patterns of sex discrimination permeate our social, cultural, and economic life. Much of this discrimination is directly attributable to State action, both in maintaining archaic discriminatory laws and in tolerating and perpetuating discriminatory practices in employment, education and other areas. The social and economic cost to our society, as well as the individual psychological impact of sex discrimination, are immeasurable. That the majority of our population should be subjected to the indignities and limitations of second-class citizenship is a fundamental affront to personal human liberty. We submit that State action which in any way perpetuates this invidious sex discrimination should be subject to the strictest application of the Equal Protection Clause.

Startling as the revelation might be to many Americans, it is a fact that sex discrimination takes an even greater economic toll than racial discrimination. In 1968 the median earnings of white men employed year-round full-time were \$7,396, of Negro men \$4,777; of white women \$4,279, of Negro women \$3,194. Women with some college education, both white and Negro, earn less than Negro men with eight years of education.¹ That sex discrimination can be even more invidious than racial discrimination was eloquently demonstrated by Congresswoman Shirley Chisholm in her testimony on the Equal Rights Amendment: "I have been far oftener discriminated against because I am a woman than because I am black." Hearings on the Equal Rights Amend-

¹"A Matter of Simple Justice," Report of the President's Task Force on Women's Rights and Responsibilities, 18-19 (1970).

ment Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess., at 35 (May 1970).

Federal, State, and local governments bear a substantial responsibility for perpetuating these pervasive patterns of sex discrimination. Through discriminatory employment practices, through financial support of public institutions such as universities, and by permitting archaic discriminatory laws to remain in effect, government at all levels is implicated in subjecting women to second-class treatment. The effect of governmental involvement in sex discrimination is magnified far beyond its actual scope since governmental policies have traditionally set a standard for practices in the private sector.

Sex Discrimination in Employment

Although the vast majority of the labor force is employed in the private sector, State, local and federal governments, including the military, employ more than 15,000,000 people—more than 20 percent of the labor force.² More important than the actual numbers suggest, governments are often looked to by private employers as models in relation to employment practices. Therefore, it is especially disturbing that studies of government employment practices reveal patterns of sex discrimination as pervasive as those in the private sector.³ For example, although women constituted 34 percent of all full-time white collar federal Civil Service employees in 1967, they filled more than 62 percent of the four lowest grades and only 2.5 percent or less of the four

²U.S. Bureau of the Census, Statistical Abstract of the U.S.: 1970, Table 325, p. 218.

³The discrimination has persisted in spite of Executive Order 11357, 3 C.F.R. § 320 (1967), and Executive Order 11478, 3 C.F.R. § 133 (1970) which prohibit sex discrimination in the executive agencies of the Federal government, in competitive positions in the legislative and judicial branches, and in the government of the District of Columbia.

highest grades.⁴ In October, 1969, of the 665,000 women in full-time white collar Civil Service positions (33.4 percent of the total), 77.8 percent were in the six lowest grade levels. In the three-year period 1966-1969, women's share of jobs in grade levels GS-13 and above rose only slightly, from 3.5 percent to 3.8 percent.⁵

Equally pervasive patterns of sex discrimination persist in the private sector.⁶ Whatever the occupation, there is a dramatic differential in earnings between men and women at every level. The median salary income for women is only 60.5 percent of that earned by men. The gap in earnings is largest for sales workers; women in this category earn less than half—41 percent—of what men doing similar work earn. While the wage gap is smallest in clerical, professional, and technical fields, women still earn only 65 percent of what men earn in those same fields. In 1969, less than 5 percent of all full-time women workers earned over \$10,000 a year,

⁴U.S. Civil Service Commission, Bureau of Management Services, "Study of Employment of Women in the Federal Government, 1967," at 17 (1968).

⁵Statement of Irving Kator, Asst. Executive Director, U.S. Civil Service Commission, Hearings on Sex Discrimination Before the Special Subcommittee on Education of the House Committee on Education & Labor, 91st Cong., 2nd Sess., Part 2, at 728-729 (1970) (hereinafter cited as *Education Hearings*).

⁶Congress has made several major efforts to alleviate some aspects of this discrimination. The Equal Pay Act of 1963, 29 U.S.C. 206 (d) (1964), requires that employees engaged in interstate commerce receive equal pay for equal work. The Act does not cover administrative, executive, and professional women, nor government employees. Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1964), prohibits discrimination based on race, color, religion, national origin, or sex by employers with 25 or more employees, employment agencies which procure employees for an employer, and labor unions which maintain a hiring hall or have 25 or more members. Title VII excludes from coverage instrumentalities of the Federal, state, or municipal governments except for the U.S. Employment Service, and the system of state & local employment services receiving Federal assistance.

compared with 35 percent of all male workers. At the lowest end of the salary scale, 14.4 percent of women, but only 5.7 percent of men, earned less than \$3,000.⁷

Women have traditionally been employed in jobs which have less prestige or policy-making power than those to which men have access.⁸ In 1969, women constituted 59 percent of all service workers, exclusive of private household employees.⁹ A survey of industry conducted the same year revealed that while women account for more than 40 percent of all white collar jobs, they hold only one in ten managerial positions and one in seven professional jobs.¹⁰

The startling disparities in income and employment opportunity between male and female workers cannot be explained by differences in education. In 1968, the median number of years of school completed by women in the total work force was 12.4 compared with 12.3 for working men.¹¹ Yet, women with four years of college education made only slightly more than men with an eighth grade education.¹² Nor can the disparities be explained by the assumption that women work only for their personal interests, rather than for their livelihood. In 1969, at least 12 million women,

⁷U.S. Department of Labor, Women's Bureau: "Fact Sheet on the Earnings Gap" (Feb. 1971).

⁸Recruiting policies are in part responsible for the concentration of women in less prestigious jobs. For example, a 1969 survey showed that of 208 companies recruiting at Northwestern University, only 63% were considering female graduates. "Special Report: Why Doesn't Business Hire More College Trained Women?" in *Personnel Management-Policies & Practices* (April 1969), reprinted in *Education Hearings*, Part 1, at 174.

⁹U.S. Dept. of Labor, *supra* note 7.

¹⁰Equal Employment Opportunity Report No. 1, "Job Patterns for Minorities and Women 1966" (1969).

¹¹U.S. Dept. of Labor, Women's Bureau, "Background Facts on Women Workers in the United States" 11-12, 1970.

¹²President's Task Force, *supra* note 1.

or 40 percent of working women, were self-supporting; further, 5.4 million families were totally dependent on the earnings of women.¹³ The conclusion is inescapable that the inferior economic position of working women is the direct result of pervasive sex discrimination in both the private and the public sector. This discrimination has massive adverse impact on the economy of the entire nation, as well as on the lives of working women and on the people who look to them for economic support.

Sex Discrimination in Education

Another area in which state action contributes directly to sex discrimination is in the educational field. Colleges and universities have a critical role in determining employment opportunity for women by providing access to professional training and careers. Yet widespread patterns of sex discrimination are found in the admissions policies and hiring practices of institutions of learning throughout the country.

Such discriminatory practices are inextricably tied to government both at the State and federal level, in that even privately endowed institutions receive substantial federal assistance directly through specific grants or indirectly through service contracts, research grants, and student loan programs. Further, the vast majority of college graduates come from state supported institutions, some of which expressly discriminate against women. The University of North Carolina at Chapel Hill, for example, published in the fall of 1969 a "Profile of the Freshman Class" which stated that "admission of women on the freshman level will be restricted to those who are especially well qualified." At Texas A & M, a land-grant, state-supported university, women students are admitted only for summer school sessions, and never to the regular academic curriculum, unless they are

¹³U.S. Dept. of Labor, *supra* note 11; U.S. Dept. of Labor, Bureau of Labor Statistics: Monthly Labor Review (May 1970).

related to employees or students, and they wish to pursue a course of study otherwise unavailable.

Discrimination against women does not end with admission to college or graduate school; it pervades every level of the teaching profession. Although more than two-thirds of the teachers in public elementary and secondary schools are women, they constitute only 22 percent of the elementary school principals and only 4 percent of the high school principals. A recent survey by the National Education Association reported that of 13,000 school superintendents, only 2 were women.¹⁴

At the college faculty level, sex discrimination becomes even more pronounced. A report on the distribution of women faculty at ten high endowment institutions of higher education in 1960 showed that the proportion of women faculty ranged downward from 9.8 percent of instructors to 2.6 percent of full professors.¹⁵ A survey of 188 major departments of sociology revealed that women accounted for 30 percent of the doctoral candidates, but comprised only 4 percent of full professors and 1 percent of departmental chairmen.¹⁶ Similar studies conducted in public and private colleges and universities throughout the country con-

¹⁴Testimony of Dr. Peter Muirhead, Associate Commissioner of Education, Dept. of Health, Education & Welfare, *Education Hearings*, Part 2, at 644.

¹⁵See *Education Hearings* for statistical reports & statements on the status of women at the following colleges & universities: Brandeis at 336; Univ. of Buffalo, SUNY, at 212; Cal. State College at Fullerton, at 202; Univ. of Cal. at Berkeley at 1143; Univ. of Chicago at 753, 994; Columbia Univ. at 242, 260; Cornell Univ. at 1077-78; Eastern Ill. Univ. at 1222, 1223; Harvard Univ. at 183; Univ. of Illinois at 1225; Kansas State Teachers College at 1226; Univ. of Maryland at 1024; N.Y.U. Law School at 584; Univ. of Wisconsin at 190.

¹⁶Rossi, "Status of Women in Graduate Departments of Sociology 1968-69," 5 *American Sociologist* 1, Feb. 1970.

firm this dismal picture of pervasive sex discrimination in the academic world.¹⁷

Sex Discrimination in State Regulatory and Criminal Laws

Although shockingly archaic in the second half of the twentieth century, State laws which severely restrict the activities of married women in the business and professional world continue to exist. Four States require a married woman to obtain a court order before establishing an independent business. Eleven States place special restrictions on the right of a married woman to contract. In three States, a married woman cannot become a guarantor or surety. In only five States does she have the right to establish her own domicile. In seven of the eight community property States, the husband has control over the community property.¹⁸

State laws also discriminate against women in other ways. In many States, only a woman can be prosecuted for prostitution, and only her conduct, not her male partner's, is criminal. Female juvenile offenders are also subjected to a double standard; in New York State, for example, they can be declared to be "persons in need of supervision" for non-criminal acts until age 18, while boys are covered by the statute only until age 16.¹⁹ Yet most States permit girls to marry without parental consent at an earlier age than boys, presumably because of some State determination that early marriage is more appropriate and proper for women than for men.

Similar assumptions are reflected in State criminal laws which discriminate against women. In Arkansas, for example, a woman can be sentenced to 3 years in jail for habitual

¹⁷Murray, "Economic and Educational Inequality Based on Sex: An Overview," 5 Valparaiso U. L. Rev. 237, 247-268 (1971).

¹⁸These statistics are drawn from Freeman, *The Legal Basis of the Sexual Caste System*, 5 Valparaiso U.L.Rev. 203, 210-216 (1971).

¹⁹New York Family Court Act, § 712(b).

drunkenness, while a man can receive only 30 days for the same offense.²⁰ In Texas and Utah, the defense of "passion killing" is allowed to the wronged husband, and not to the deceived wife.²¹

The provisions of Idaho and Louisiana laws challenged in the cases at bar are further examples of invidious sex discrimination perpetuated by State action. In light of the pervasive nature and adverse effect of sex discrimination throughout American society, such laws should be subjected to the most rigorous judicial scrutiny under the Fourteenth Amendment.

II

IN THE PAST, THIS COURT HAS SANCTIONED SEX DISCRIMINATION WHENEVER IT WAS THOUGHT TO BE BASED UPON SOME "REASONABLE" GROUND.

Since the ratification of the Fourteenth Amendment in 1868, numerous cases challenging State practices and laws perpetuating sex discrimination have been brought before this Court. Yet despite evidence that sex discrimination is at least as invidious, pervasive, and damaging as racial discrimination, this Court has never struck down any law because it denied the Equal Protection of the Laws to either sex. Because this Court has found every instance of sex discrimination to be "reasonable" and therefore—according to its standard—constitutional, the Equal Protection Clause has been effectively rendered a nullity as far as sex discrimination is concerned.

The first significant case involving sex discrimination was *Bradwell v. Illinois*, 83 U.S. 130 (1872), in which the Court upheld the refusal of the Supreme Court of Illinois to

²⁰ Ark. Stats. Ann., §§ 46-804, 48-943.

²¹ Texas Penal Code 1220; Utah Code § 76-30-10(4).

allow women to practice law.²² Although the Court relied on the Privileges and Immunities Clause of the Fourteenth Amendment and not the Equal Protection or Due Process Clauses, the presumptions and attitudes which were to govern later decisions sanctioning sex discrimination were already apparent:

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. (Bradley, J., concurring, 83 U.S. at 141)

Two years later, the Court held that the Fourteenth Amendment did not confer on women citizens the right to vote, in *Minor v. Happersett*, 88 U.S. 162 (1874), a position which stood until ratification of the Suffrage Amendment in 1920.

The test of "reasonableness" for determining the validity of sex discrimination under the Fourteenth Amendment was first expressly stated in the landmark case of *Mueller v. Oregon*, 208 U.S. 412 (1908), which upheld an Oregon maximum hour law for women. It is ironic that *Mueller*, which represented the most progressive thinking of its time, should have become the cornerstone of a judicial philosophy which upheld almost all forms of discrimination against women as "reasonable," and therefore not in violation of the Equal Protection Clause.

²²See also *In re Lockwood*, 144 U.S. 116 (1893), in which the Court held that the Fourteenth Amendment did not prohibit Virginia from denying women admission to practice before the highest state court.

In *Mueller* the Court was responding to the demonstrated need for legislative protection of working conditions, a protection which it subsequently upheld for both men and women. *Bunting v. Oregon*, 243 U.S. 426 (1917). Yet the assumptions about women on which the Court based its decision in *Mueller* have become firmly entrenched in judicial doctrine. Finding that the apparent difference in physical endurance and strength between men and women justified the State's restriction on women's right to work, the Court stated:

That woman's physical structure and performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . 208 U.S. at 421.

Under similar reasoning, the Court sustained other restrictive labor laws for women in subsequent years as "reasonable" under the Fourteenth Amendment. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (minimum wage law for women upheld as reasonable exercise of State's police power); *Radice v. New York*, 264 U.S. 292 (1924) (law prohibiting night-time employment of women in restaurants not unreasonable or arbitrary classification); *Miller v. Wilson*, 236 U.S. 375 (1915) (women's eight-hour labor law not an arbitrary invasion of liberty of contract nor unreasonably discriminatory).

Applying the standard of "reasonableness," the Court failed to find constitutional fault with later labor laws which appeared to have little if any reasonable justification. A good example is the case of *Goesart v. Cleary*, 335 U.S. 464 (1948), in which the Court upheld a Michigan statute prohibiting all females—other than the wives and daughters of male licensees—from being licensed as bartenders. The Court reasoned that,

Bartending by women, may, in the allowable legislative judgment, give rise to moral and social prob-

lems against which it may devise preventive measures. Since the line drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind the legislation was an unchivalrous desire of male bartenders to monopolize the calling. 335 U.S. at 466-467.

The Court in *Goesart* assumed that such patently discriminatory legislation could be sustained if it were "reasonably" related to the State's objective in making such a classification. The Court did not even explore the possibility that a more rigorous constitutional standard should be applied. It specifically refused to consider whether the statute might reflect an "unchivalrous desire" of males to monopolize the bartending trade—as the Court itself noted. Moreover, the Court's concern for protecting women from the noxious "moral and social" influences of the barroom was misplaced, since Michigan permitted women to work in bars, prohibiting them only from employment as bartenders. Furthermore, the statute itself exempted the wives and daughters of bartenders from its supposed protection.

More recently, in *Hoyt v. Florida*, 368 U.S. 57 (1961), the Court upheld a Florida statute providing that no female would be called for jury service unless she had registered to be placed on the jury list. The Court found that such discrimination was permissible under the Fourteenth Amendment, since it was reasonable

... for a state, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities. 383 U.S. at 62.

It is this predetermined, generalized conception of the nature and role of women that underlies the Court's past decisions finding sex discrimination a "reasonable" exercise of the State's police power. Women as a group have been judicially viewed primarily as being limited to the home and family. Further, they have been regarded as weaker in strength and endurance than men and as less able to protect

themselves against moral corruption and economic exploitation. While this view may be accurate for some women, it might also be accurate for some men. As a generalization, it is clearly inapplicable to the vast majority of women in our society today. Because of the continued application of this outdated conception of the role and nature of women, the majority of our population has been subjected to massive discrimination in the labor market, in education, and in virtually every significant aspect of American life.

In the 63 years since *Mueller* was decided, there has been great progress in securing adequate protection for all people in the labor force. The need for government to establish protective discriminatory legislation has been overcome by progress in the private sector, primarily through the recognition and use of collective bargaining to protect the interests of workers. The benevolent intent of *Mueller* is no longer needed today; in fact, the sex discrimination which the Court upheld in *Mueller* has become a pernicious force in excluding women from the full range of opportunity available to men. The Equal Protection Clause is flexible enough to incorporate this change. State action which perpetrates sex discrimination should no longer be subjected to the test of "reasonableness;" rather, it should be subjected to the most rigorous judicial scrutiny under the Fourteenth Amendment.

III. THERE IS INCREASING RECOGNITION IN THE COURTS AND THROUGHOUT AMERICAN SOCIETY THAT SEX DISCRIMINATION CAN NO LONGER BE JUSTIFIED.

In the past few years, there has been significant and substantial recognition throughout our society that sex discrimination can no longer be tolerated. Increasingly, the American people have come to recognize that it is neither constitutionally permissible nor morally justifiable to subject the majority of our population to second-class status. This growing trend to reject sex discriminatory practices is apparent in the following areas:

Title VII enforcement actions.

In August 1969, the Equal Employment Opportunity Commission, which administers Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (1964), ruled that State laws which restrict the employment of women are invalidated by Title VII. 29 C.F.R. 1604.1 (1970).

Following the lead of the Commission, the Federal courts have struck down a number of State restrictive laws and private discriminatory practices. Although Title VII does not apply "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation" of a particular business or enterprise, 42 U.S.C. 2000e-2(e) (1964), the Court of Appeals for the Fifth Circuit, in the landmark case of *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), construed this exemption very narrowly. The Court held that the company could not rely on an arbitrary weight limit to justify its refusal to promote women unless it could show "that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

The Court stated that hiring and promotion rules differentiating on the basis of sex were generally unacceptable under Title VII: "Moreover, Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks." 408 F.2d at 236.

The Seventh Circuit Court of Appeals followed the *Weeks* lead in *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). The Court held that Title VII proscribed a company-imposed weight restriction applied to women only, and specifically stated that the company could retain the weight lifting limit only if it were applied as a general guideline to all employees, male and female alike.

Perhaps the most significant decision in this area is *Phillips v. Martin Marietta Corporation*, 400 U.S. 542 (1971). The Court of Appeals for the Fifth Circuit had held below that

Title VII allowed an employer to refuse to hire mothers of pre-school age children, since sex was not the only factor involved in the decision. 411 F.2d 1 (5th Cir. 1969). This Court granted *certiorari*, making *Phillips* the first case of sex discrimination under Title VII to be heard by the Supreme Court. In a unanimous decision, this Court ruled that the Fifth Circuit had erred in interpreting Title VII as permitting one hiring policy for women and another for men—each having pre-school age children. In remanding for a fuller development of the record, the Court held that Title VII requires persons of like qualifications be given employment opportunities irrespective of their sex. Like *Phillips*, the cases at bar present another fundamental question of degree in dealing with substantial allegations of sex discrimination.

Within the past few months, the Court of Appeals for the Ninth Circuit in *Rosenfeld v. Southern Pacific Company*, 3 FEP Cases 604 (June 1971), has struck down a California weight and hours law which applied only to women, finding that Title VII was intended to invalidate just such discriminatory laws. The Court stated, "The premise of Title VII . . . is that women are now to be on an equal footing with men . . . Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity." 3 FEP Cases at 608.

Another important recent decision from the Ninth Circuit in the area of employment discrimination is *Mengelkoch v. Industrial Welfare Commission*, 437 F.2d 563 (9th Cir. 1971).²³ While remanding a challenge to a California maximum hours law for women brought under both the Fourteenth Amendment and Title VII, the Court struck a blow at the continuing viability of *Mueller v. Oregon*, *supra*. It pointed out that the employment conditions which led to the *Mueller* decision are no longer wholly relevant today.

²³ *Mengelkoch v. Industrial Welfare Commission*, 284 F. Supp. 950 (C.D. Calif.), *vacated*, 393 U.S. 83, *rehearing denied*, 393 U.S. 993 (1968), *rev'd and remanded*, 437 F.2d 563 (9th Cir. 1971), *rehearing denied*, 3 FEP Cases (May 3, 1971).

As the Court stated, "Women still differ physically from men and still perform maternal functions. It may be seriously questioned, however, whether some or all of the other conditions referred to in the *Mueller* opinion exist today or, if they do exist, whether they have the same importance as was attributed to them sixty-two years ago." 437 F.2d at 567.

The Federal District Courts have also struck down a number of State restrictive labor laws applicable only to women on the ground that such laws conflict with Title VII and are therefore invalid under the Supremacy Clause of the United States Constitution.²⁴

As the Courts have recognized in striking down sex discrimination in employment, working conditions have improved dramatically in the past 63 years. Since 1908 when *Mueller* first established the validity of restrictive labor laws for women, the overriding and understandable concern for protecting women and children from harmful working conditions has been the motive force in leading the Courts to avoid a strict application of the Fourteenth Amendment to sex discrimination. It is undeniable, however, that collective bargaining has become an effective means of protecting workers from exploitive employer practices. Thus, the cases which have arisen under Title VII in the past few years should be viewed not only as interpretations of Title VII;

²⁴ *Kober v. Westinghouse Electric Corp.*, 3 FEP Cases 326 (W.D. Pa. 1971) (Penn. statute limiting hours of work of female employees invalid); *Ridinger v. General Motors Corp.*, 3 FEP Cases 280 (S.D. Ohio 1971) (Ohio weight and hours law applicable only to women invalid); *Garneau v. Raytheon Co.*, 3 FEP Cases 215 (D. Mass. 1971); (Mass. law limiting maximum hours of employment for women invalid); *Local 246, Utility Workers v. Southern Calif. Edison Co.*, 320 F. Supp. 1262 (C.D. Cal. 1970) (California law prohibiting female employees to lift over 50 pounds invalid); *Caterpillar Tractor Co. v. Grabiec*, 317 F. Supp. 1304 (S.D. Ill. 1970) (Ill. Female Employment Act hours limitation void); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969) (Order of state wage and hour commission setting 30 pound lifting limit for women employees invalid).

they should also be viewed as implicitly giving judicial recognition to the fact that "protective" legislation for women is no longer necessary or appropriate. The United Auto Workers, one of the largest and most progressive labor unions in the country, has long recognized that State protective laws have been used by employers to deny women as a class opportunities to work overtime, to bid on certain jobs, work in certain departments and on certain shifts, regardless of the fact that an individual woman might have had the seniority, skill and ability which should have been recognized in any of these situations. See UAW Administrative letter, Vol. 21, No. 10, Nov. 6, 1969, reprinted in Hearings on the Equal Rights Amendment Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 91st Cong., 2nd Sess., at 595 (May 1970). The UAW has urged strict enforcement of Title VII and has strongly supported all efforts to eradicate sex discrimination, especially through the adoption of the Equal Rights Amendment. Mrs. Olga Madar, Vice-President of the UAW, testifying for the adoption of the Equal Rights Amendment, stated that "... a very strong tide is running in behalf of the proposition that American women, while they may like candy and roses, really need basic rights still denied them. Rights not roses is the watchword for an increasing number of American women ..." *Id.*, at 611.

Sex discrimination held unconstitutional.

In the past few years, courts across the country have increasingly recognized the unconstitutionality of State action which perpetuates sex discrimination. Many of these decisions are based squarely on the ground that sex discrimination must be reviewed under the strictest Fourteenth Amendment standard and that seldom if ever can such discrimination withstand careful judicial scrutiny.

Perhaps the most striking progress in eradicating sex discrimination is in the area of occupational restrictions. In effect, this Court's decision in *Goesart v. Cleary*, 335 U.S. 464 (1948), has been rejected by the Supreme Courts of

New Jersey and California, and by the Federal District Court for the Northern District of Illinois. Each of these cases involved challenges to laws prohibiting women from employment as bartenders, laws which were similar to the Michigan statute sustained by this Court in the *Goesart* decision, held that the sex discrimination embodied in such occupational restrictions could not be sustained under the Fourteenth Amendment. *McCrimmon v. Daley*, 2 FEP Cas. 971 (N.D. Ill. 1970); *Sail'er Gun, Inc. v. E.J. Kirby*, 3 CCH Employment Practices Decisions, para. 8222 (Cal. Supreme Court, 1971); *Paterson Tavern & Grill Owners Ass'n v. Borough of Hawthorne*, 57 N.J. 180, 270 A.2d 628 (1970).

Some of the principal cases striking down sex discrimination in other areas can be grouped in the following categories:

(1) *Criminal law*: Longer prison terms for women than for men convicted of the same crime have been declared unconstitutional under the Fourteenth Amendment. *United States ex rel. Robinson v. York*, 281 F. Supp. (D. Conn. 1968) (differential sentencing laws for men and women constitute "invidious discrimination" against women in violation of the Equal Protection of the laws guaranteed by the Fourteenth Amendment), *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968) (statutory scheme fixing the maximum term of imprisonment for women but not for men convicted of the same crime creates an arbitrary and invidious discrimination in violation of the Fourteenth Amendment).

(2) *Public accommodation*: Exclusion of women from liquor licensed public taverns has been held to violate the Fourteenth Amendment. *Seidenberg v. McSorleys' Old Ale House, Inc.*, 308 F. Supp. 1253 (S.D.N.Y. 1969). See also, *Mollere v. Southeastern Louisiana College*, 304 F. Supp. 826 (E.D. La. 1969), in which a federal court held unconstitutional a requirement that unmarried women under 21 live in the State college dormitory when no such requirement was imposed on men.

(3) *University exclusion*: Exclusion of women students from state-supported "prestige" institutions has been held to violate the Fourteenth Amendment Equal Protection guarantee. *Kirstein v. Rector and Visitors of University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970).

(4) *Mandatory maternity leave*: A regulation requiring a female teacher to leave her job in the fifth month of pregnancy has been held to violate her right to Equal Protection. *Cohen v. Chesterfield County School Board*, Civ. Action No. 678-79-R (E.D. Va. May 17, 1971).

(5) *Exclusion from promotion examination*: The exclusion of policewomen from the examination required for promotion to sergeant solely because of sex has been struck down as an impermissible denial of constitutional rights. *Matter of Shpritzer v. Lang*, 234 N.Y. Supp. 2d 285 (1st Dept. 1962), *aff'd* 13 N.Y.2d 744, 241 N.Y. Supp. 2d 869, 191 N.E.2d 919 (1963).

(6) *Inheritance tax*: Inheritance tax imposed on certain property when devised by husband to wife, but not when devised by wife to husband, has been held to violate the Equal Protection guarantee. *In re Estate of Legatos*, 1 Cal. App.3d 657, 81 Cal. Rptr. 910 (1969).

(7) *Jury service*: The statutory exclusion of women from jury service has been held to violate the Fourteenth Amendment's Equal Protection Clause. *White v. Crook*, 251 F. Supp. 401 (N.D. Ala. 1966).

The judicial trend apparent from even this small sample of cases is clear. Courts across the country are beginning to recognize that laws or practices which subject women to differential or inferior treatment because of their sex are no more constitutionally permissible than other forms of invidious discrimination, particularly racial discrimination. In striking down sex discrimination, some courts have adopted the "rigid scrutiny" test of the strictest Fourteenth Amendment Equal Protection standard.

Increased pressure for adoption of an Equal Rights Amendment to the United States Constitution.

The growing recognition that fundamental changes must be made in the legal status of women in this country is reflected in the widespread support for an Equal Rights Amendment. Although such an amendment has been introduced in Congress for the past 48 years, the mounting pressure in recent years to eradicate sex discrimination resulted in its adoption last year by the House of Representatives. The Amendment failed in the Senate by only a narrow margin.

Much of the motive force behind the proposed Amendment is due at least in part to the past unwillingness of this Court to apply the Fourteenth Amendment Equal Protection guarantee to cases of sex discrimination, as demonstrated by *Goesart v. Cleary*, 335 U.S. 464 (1948), and *Hoyt v. Florida*, 368 U.S. 57 (1961). As a result, many women feel that the right for full legal equality cannot be won in the courts. As Congresswoman Martha Griffiths stated in her recent testimony in support of the Equal Rights Amendment:

You may ask why a constitutional amendment is needed to correct the problem of unfair sex discrimination. Why won't the Fourteenth Amendment do the job? Because the Fourteenth Amendment has been with us since 1868, and in all those years the Supreme Court has never once held unconstitutional a law which discriminated on the basis of sex. No woman has ever won a case before the Supreme Court on the Fourteenth Amendment. Hearings on the Equal Rights Amendment Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92nd Congress, 1st Session, ser. 2, at 41 (March 1971).

Many other women who testified in support of the Equal Rights Amendment expressed similar views on the Court's unwillingness to strike down sex discrimination under the Fourteenth Amendment. They also recognized, and we agree

that when this Court does act to end sex discrimination, an Equal Rights Amendment would still be desirable, if only because of its immense symbolic value. As Caroline Byrd, author of "Born Female," has stated:

Even if the equal rights amendment did nothing but state the principle, it would be worth it . . . the time has come when this . . . amendment is both needed and politically feasible. Women are beginning to see their situation. They can never go back so we must all go forward. Hearings on the Equal Rights Amendment Before Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary, 91st Cong., 2nd Sess., at 347 (May 1970).

State legislative action to end sex discrimination.

An equally significant indication of the growing recognition that sex discrimination can no longer be tolerated in our society is the increasing number of States that have voluntarily rescinded or invalidated restrictive labor legislation which applies only to women. In 12 States attorneys general have ruled that Title VII and state fair employment practices legislation supercedes state legislation restricting the employment of women. Since the effective date of Title VII, July 2, 1965, eight States and the District of Columbia have amended or repealed discriminatory legislation, thereby substantially expanding employment opportunities for women.²⁵ It seems clear that State governments as well as federal and State courts are coming to recognize that sex discrimination is anachronistic and unjustifiable both because of the broad application of Title VII and because of the unconstitutional nature of such discrimination.

²⁵ These statistics are drawn from Task Force on Labor Standards, *Report to the Citizens' Advisory Council on the Status of Women* 56-58 (1968), and Ross, "Sex Discrimination and Protective Labor Legislation," in Hearings on the Equal Rights Amendment Before Subcomm. No. 4 of the House Comm. on the Judiciary, 92nd Cong., 1st Sess., at 186 (1971).

Elimination of sex discrimination at all levels of American society.

Women now participate in occupations and activities which were unthinkable in even the recent past. They serve as pages in the U.S. Senate, work as professional clowns and jockeys, and even play professional football. The U.S. Army and Air Force have recently sworn in the first women Generals. The Executive Protection Service, an arm of the United States Secret Service, has hired a women agent. Many religious orders are opening their highest ranks to women.

The trend towards eliminating sex-role stereotypes has increased the number of opportunities available for men as well as for women. Men now work as nurses, airline attendants, and nursery school teachers, professions previously considered to be particularly limited to women.

Organizations and institutions which have traditionally been almost exclusively male have begun to recognize the need to afford women greater representation. Only this year, the National Press Club admitted women members for the first time in its 50 year history. The New York Stock Exchange, exclusively male for 176 years, now permits a woman to hold a seat on the Exchange. The Democratic National Committee recently adopted a resolution that women be represented in State delegations in reasonable relationship to their presence in the populations of each State. The Republican National Committee last month recommended that each State delegation have equal representation of men and women. The American Bar Association has established a new committee on rights for women.

In short, there has been significant, substantial recognition throughout our society that sex discrimination can no longer be tolerated. Increasingly, the American people have come to recognize that women, like all citizens, must be accorded equal treatment under law and equal access to opportunities in every field of endeavor. In harmony with these developments, this Court should explicitly hold

that State laws discriminating on the basis of sex will be subjected to the "most rigid scrutiny," as required by the Fourteenth Amendment.

IV. THIS COURT SHOULD REVIEW CASES INVOLVING SEX DISCRIMINATION WITH THE "MOST RIGID SCRUTINY," IN ORDER TO STRIKE DOWN STATE ACTION WHICH DISCRIMINATES ON THE BASIS OF SEX, JUST AS THIS COURT HAS STRUCK DOWN OTHER FORMS OF PERSONAL DISCRIMINATION AFFECTING FUNDAMENTAL HUMAN FREEDOMS, PARTICULARLY RACIAL DISCRIMINATION.

The Fourteenth Amendment forbids any State to "deny to any person within its jurisdiction the Equal Protection of the laws." State power to prescribe regulatory laws, including laws which determine the right to administer an estate and the right to serve on juries, is limited by the Equal Protection Clause. This Court has traditionally recognized that when fundamental individual rights are infringed by State action, such action must be "carefully and meticulously scrutinized" under the Fourteenth Amendment.

Thus, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held unconstitutional a State apportionment scheme not based substantially on population, stating that

A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature . . . (A)ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. 377 U.S. at 561-62.

Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, *Brown v. Board of Education*, 347 U.S. 483, or

economic status, *Griffin v. Illinois*, 351 U.S. 12, *Douglas v. California*, 372 U.S. 353. *Id.* at 566.

One year after *Reynolds*, this Court struck down a State limitation on voting qualification in *Carrington v. Rash*, 380 U.S. 89 (1965), reasserting the principle that State action which infringes "matters close to the core of our constitutional system" cannot be sustained under the Equal Protection Clause. The Court stated ". . . By forbidding a soldier ever to controvert the presumption of nonresidence, the Texas Constitution imposes an invidious discrimination in violation of the Fourteenth Amendment." 380 U.S. at 96.

The standards of Equal Protection are not static, but move with the times. Thus, in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), in which the Court held unconstitutional the Virginia poll tax, the Court stated

the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality, . . . Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause *do* change. 383 U.S. at 669 (emphasis in original).

Notions of what constitutes equal treatment for the purposes of the Equal Protection Clause have changed dramatically in the past 50 years. Within the expanding concept of Equal Protection, this Court has subjected an increasing number of State laws which impair the exercise of fundamental rights to the strictest Fourteenth Amendment review. Further, this Court has recognized that State infringement of fundamental rights cannot be justified when such limitation of personal freedom is applicable only to one specific group within the community.

Thus, in *Truax v. Raich*, 239 U.S. 33 (1915), this Court invalidated a State law which discriminated against aliens in private employment. In *Takahashi v. Fish & Game Com-*

mission, 334 U.S. 410 (1948), the Court held that California could not prohibit aliens from making a living by fishing off the State shore line, stating that

The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws. 334 U.S. at 420.

Just last Term this Court struck down State laws which deny welfare benefits to resident aliens or require them to meet longer residence requirements than citizens in order to qualify for welfare benefits. *Graham v. Richardson*, 39 U.S.L.W. 4732 (1971).

Nor can a State deny fundamental rights to citizens because of their poverty. Thus, in *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court held that Illinois could not block effective appellate review for the indigent by refusing to furnish them trial transcripts without cost. And in *Douglas v. California*, 372 U.S. 353 (1963), this Court overturned a California rule of criminal procedure limiting free counsel for indigent defendants on appeal to those cases in which the court, after a preliminary screening of the case, thought counsel would be useful. More recently, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Court struck down a one-year State residency requirement for welfare benefits, stating that

Since the classification here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* State interest. Under this standard, the waiting period requirement clearly violates the Equal Protection Clause. 394 U.S. at 638 (emphasis in original).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court ruled that the State's interest in minimizing administrative costs did not justify the termination of welfare benefits without

a prior hearing. And last Term in *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held that a State could not deny access to the courts in divorce cases solely because of a party's inability to pay court costs.

The most significant use of the Equal Protection Clause within the past twenty years, of course, has been in the area of racial discrimination. In response to the clearly adverse economic, social, and cultural impact of racial discrimination on our society, this Court in 1954 announced the landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), which outlawed racial segregation in the public schools. Relying on the Equal Protection Clause, the Court stated:

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. 347 U.S. at 495.

Since the *Brown* decision, the Court has strictly applied the Fourteenth Amendment to all cases involving racial discrimination. Thus, in *McLaughlin v. Florida*, 379 U.S. 184 (1964), the Court struck down a State law prohibiting cohabitation of unmarried couples of different races, stating that

(T)he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect' and subject to the 'most rigid scrutiny' and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose. 379 U.S. at 192.

The Court used similar language about the reach of the Equal Protection Clause to strike down a State anti-miscegenation law in *Loving v. Virginia*, 388 U.S. 1 (1967):

Over the years, this Court has consistently repudiated 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of

equality.' At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny,' . . . 388 U.S. at 11 (citations omitted).

More recently, in *Hunter v. Erikson*, 393 U.S. 385 (1969), the Court held unconstitutional a city charter amendment imposing special barriers to the enactment of fair housing ordinances. Reasserting the principle that State imposed deprivations of fundamental rights must be subjected to the most rigorous judicial scrutiny, the Court said

Because the core of this Fourteenth Amendment is the prevention of meaningful and justified official distinctions based on race, racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications. 393 U.S. at 391-92 (citations omitted).

Sex discrimination has had at least a substantial an adverse impact on our society as the other forms of discrimination which this Court has struck down under the Fourteenth Amendment. Women have as great a claim to the protection of the Fourteenth Amendment as do aliens, indigents, and members of racial minorities. As demonstrated above, women have been subjected to pervasive, invidious discrimination in employment, in education, and in every field of endeavor. Their basic rights as citizens have been denied through the operation of archaic, discriminatory State laws and practices which have reduced them to inferior status as second-class members of this society.

Until the Court recognizes women as persons entitled to the full Equal Protection of the Laws, they will continue to be denied the equality of treatment basic to our concept of democracy. The challenged provisions of Idaho and Louisiana law perpetuate the legal inequality accorded women throughout our history: they preclude women from the exercise of basic statutory rights because of erroneous

legislative assumptions about the nature and capabilities of women as an entire class. In harmony with this Court's previous holdings that laws which deny fundamental human rights must be subjected to the most thorough judicial scrutiny, State action which perpetuates sex discrimination should be held unconstitutional.

V. UNDER THE FACTS OF THE CASES AT BAR, AND UTILIZING THE RIGID SCRUTINY DEMANDED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, THE CHALLENGED STATE ACTION MUST FALL.

A. The Absolute Preference Given by Section 15-314, Idaho Code, to Males Over Females As Between Persons Equally Entitled to Administer an Estate, Is Invalid Under the Equal Protection Clause.

As indicated by the court below, Section 15-314 embodies a legislative judgment that men are in general better qualified to act as administrators than are women. No evidence was provided, however, that the male contestant, as an individual, was more capable in financial matters than the female contestant, appellant herein. Thus, on the basis of a vast and inaccurate legislative classification, appellant was deprived of the substantive right to administer the estate of her deceased son.

It is precisely this type of sweeping legislative classification based on sex that this Court should subject to the most careful judicial review. Even on its face, the legislative assumption underlying Section 15-314—that women are generally less able than men to administer an estate—is invalid. As discussed above, the participation of women in the business world has grown dramatically in the past decade. Further, women represent an increasingly significant portion of those professions particularly related to financial management. In 1968, women constituted 20 percent of the total

number of accountants in this country, 10 percent of the total number of mathematicians, and 33 percent of the total number of statisticians.²⁶ In light of the demonstrated competence of some women to perform these highly technical jobs, the Idaho legislature was clearly proceeding on unwarranted, inaccurate assumptions about the abilities of women as a class.

Moreover, it is questionable whether extensive business experience is necessary for the performance of the duties of an administrator under the Idaho Code. The Code confers very limited authority upon the administrator, and empowers the court to supervise the estate closely during the entire period of administration. It is probable that most women, many of whom handle the daily financial affairs of their family units, would be as qualified to perform the duties of an administrator as most men would be.

Although the Idaho Supreme Court recognized that Section 15-314 discriminates against women on the basis of sex, it sustained the provision as a legitimate exercise of the State's interest in curtailing litigation over the appointment of administrators. The court stated,

While this classification may not be entirely accurate, and there are doubtless particular instances in which it is incorrect, we are not prepared to say that it is so completely without a basis in fact as to be irrational and arbitrary. 465 P.2d 635, 638 (1970).

However, Section 15-314 achieves the presumed legislative objective of curtailing litigation *only* when a contest arises between males and females who are otherwise equally qualified under the Idaho Code to administer an estate. In most situations in which there are more than one contestant from the same eligibility class, hearings must be held. In fact, the Idaho Code invites hearings by providing that "any person interested" may challenge the competency of an admin-

²⁶U.S. Dept. of Labor, Bureau of Labor Statistics: Occupational Handbook Bulletin No. 1650 (1970).

istrator. Idaho Code, Sec. 15-322. It is only when one of the contestants within an eligibility class is female that the absolute statutory preference for males operates, thus eliminating the necessity for hearings.

This Court has held that certain basic statutory rights cannot be sacrificed to considerations of administrative efficiency. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court ruled that the Fourteenth Amendment requires that hearings be held before welfare benefits are terminated, even if such hearings cause the State substantial expense and administrative inconvenience. More recently, in *Boddie v. Connecticut*, 401 U.S. 371 (1971), the Court held that the Fourteenth Amendment prohibits a State from denying indigents access to the courts in divorce cases solely because of their inability to pay court fees and costs. The Court reasserted the fundamental principle that:

The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due. 402 U.S. at 380.

Idaho, by automatically preferring male over female contestants as between persons equally qualified to administer an estate, has denied petitioner the right to a hearing on her individual capabilities as an administrator. This statutory denial of an opportunity to be heard was justified by the court below solely on the grounds of administrative convenience. Such a deprivation of fundamental rights because of sex cannot withstand the strict judicial scrutiny required by the Fourteenth Amendment.

B. The Exclusion of Women From Juries Through the Operation of Article 402, Louisiana Code of Criminal Procedure, Is Invalid Under the Equal Protection Clause.

The Louisiana statute raises two different but related Fourteenth Amendment issues for the Court's consideration: first, whether the Equal Protection Clause permits a State to establish a different system of jury selection for women than for men; and second, whether petitioner's right to due process was violated by the operation of a State law which systematically excludes women from juries.

The challenged provision places an affirmative burden on women who wish to serve on juries by excluding them automatically from jury duty unless they file with the Court a declaration of willingness to serve. This statutory burden is made even greater by the official interpretation of Article 402. The jury commissioners obtain an initial list of potential jurors from a variety of sources and preliminary questionnaires to determine eligibility. However, questionnaires are deliberately not sent to women. As a result of this official policy, the jury list, the grand jury venire, and the grand jury that indicted petitioner contained no women at all, even though women constitute a majority of the persons eligible to serve in Lafayette Parish. Thus, the effect of the challenged provision is to exclude systematically all women from jury service.

Through the operation of Article 402, all women are placed in an inferior position to exercise their right to serve on juries. Jury service is a fundamental prerequisite of citizenship; it is generally denied only to those groups who are considered to be incapable or untrustworthy, such as felons and mental incompetents. In Louisiana, women are placed in a similarly excepted category. Thus, the effective exclusion of women from jury service clearly labels them as second-class citizens.

Presumably, the legislative assumption underlying the challenged provision is that women as a class are more likely

than men to have family responsibilities that would make jury service a hardship. It was precisely such a purpose that this Court found constitutionally permissible in *Hoyt v. Florida*, 368 U.S. 57 (1961), holding that a State could reasonably conclude "that a woman should be relieved of jury service unless she herself determines that such service is consistent with her own special responsibilities." 383 U.S. at 62. *Amicus* submits that *Hoyt* was wrongly decided.

Although *Hoyt* also involved a statute which did not absolutely prohibit women from serving on juries, the operation of the Florida statute did not exclude women as systematically as does the challenged Louisiana provision. In *Hoyt* the Court found that there were women on the jury rolls in the county, and that efforts had been made to include all eligible women on the rolls. In the case at bar, no women whatsoever were included on the jury lists, and virtually no effort seems to have been made to solicit their participation. Thus, the Louisiana provision, as interpreted by the State, effectively prohibits women from serving on juries. This case is just as compelling as *White v. Crook*, 251 F. Supp. 401 (N.D. Ala. 1966). There, a three-judge Federal district court struck down an Alabama statute which absolutely excluded women from jury service. The Louisiana statute, like the Alabama statute in *White v. Crook*, should be viewed by this Court as "arbitrary in view of modern political, social and economic conditions . . ." 251 F. Supp. at 409.

The systematic exclusion of all women from juries in order to relieve those women whose family responsibilities might make jury service a hardship cannot be sustained under a strict application of the Fourteenth Amendment. It is precisely this type of vast legislative overclassification based on sex that the Court should not allow. First, many women do not have children to care for. Second, in some cases, as where the father is a widower, the absence of a male parent can be just as detrimental to a child's welfare as the absence of the female parent, and jury duty may place an equally great burden on him. Third, even when both parents are

alive and well, the mother is not always the individual primarily responsible for child care. Thus, the Louisiana statute sweeps too broadly in effectively excluding all women from jury service if in fact its purpose is to relieve only those persons whose parental responsibilities would make jury service unduly onerous. A more effective and constitutionally permissible means of achieving this purpose would be to excuse from jury service those persons, male and female, whose family responsibilities preclude them from serving. By discriminating against women as an entire class, the statute effectively denies women the Equal Protection of the laws, and should be struck down.

The operation of the Louisiana statute also denies petitioner his due process right to a jury venire from which no class has been arbitrarily excluded. This Court has specifically recognized that a jury must be "a body truly representative of the community." *Carter v. Jury Commission of Green County*, 396 U.S. 320 (1970). A system of jury selection that totally excludes women cannot be said to be truly representative of the community. In *Ballard v. United States*, 329 U.S. 187 (1946), the Court applied this principle to the administration of federal jury selection statutes, finding that "... a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded," 329 U.S. at 194. In the case at bar, over half of the persons eligible for jury service were women. The systematic exclusion of this group from jury selection clearly denied petitioner his right to be judged by a cross-section of the community.

The denial of this fundamental constitutional right cannot be justified unless a compelling need for the classification is shown. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). As discussed above, the State has not met the burden of demonstrating that the purpose of the statute, which presumably is to exempt women whose family responsibilities would make jury service unduly burdensome, cannot be met by more narrow means that will not result in the denial of

basic constitutional rights. On the contrary, the Louisiana provision effectively excludes all women; regardless of their family responsibilities, from jury selection. Accordingly, this Court should strike down Article 402 under the strictest interpretation of the Fourteenth Amendment.

CONCLUSION

For the reasons stated above, the "reasonableness" standard for reviewing State action which discriminates on account of sex should be abandoned. Such action should be subject to the very strictest scrutiny under the Equal Protection Clause. The challenged provisions of Louisiana and Idaho law which perpetuate invidious, unjustifiable sex discrimination should be struck down under the very strictest application of the Fourteenth Amendment. In *Reed v. Reed*, this Court should reverse the decision below so that an administrator can be chosen without regard to sex. In *Alexander v. Louisiana*, this Court should reverse the decision below so that petitioner may be indicted by a properly constituted grand jury.

Respectfully submitted,

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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1970

No. 430

SALLY M. REED
Appellant,

v.

CECIL R. REED, Administrator,
In the Matter of the Estate of
Richard Lynn Reed, Deceased
Respondent

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IDAHO

BRIEF FOR RESPONDENT

RENEWAL OF MOTION TO DISMISS APPEAL

Respondent renews his motion to dismiss the appeal heretofore filed herein, particularly on ground II thereof and presents the following argument applicable thereto and to the merits.

QUESTIONS INVOLVED

There are two questions involved in this appeal.

I.

Is there a substantial federal question involved?

II.

Does Section 15-314 of the Idaho Code, insofar as it prefers males to females in the right to letters of administration of a decedent's estate, and incidentally the portions of Idaho Code Sec. 15-312, insofar as affected thereby, violate the equal protection clause of Amendment 14 of the United States Constitution?

ARGUMENT

I.

We will take up these two points separately although the arguments to a considerable extent overlap.

Considering the first question, Chapter 110 of the Idaho Session Laws of 1971, Vol. I, p. 233 adopted a substantially new Probate Code for Idaho, effective July 1st, 1972, repealing the sections of the code in controversy here. Repealed at p. 374, Sec. 5. This new law was not adopted because of any dissatisfaction with Sections 15-312 and 15-314 of the Idaho Code but because of the current public criticism prevalent in the country of the time and expense involved in probate proceedings, which is illustrated by this case.

The new classification statute establishing priorities in the rights of persons seeking appointment as administrator appears as Sec. 15-3-203, Vol. 1, p. 275, Idaho Session Laws 1971. The same

Section at p. 277 provides that only those 21 years of age are competent to act, however it also provides that those 18 years of age may nominate, and expressly qualifies married women. Single women are not disqualified, nor males preferred.

Considering the history of Sections 15-312 and 15-314 of the Idaho Code, these were taken verbatim from the Probate Practice Act of the State of California of 1851, Sections 52 and 53, Chapter 124, p. 454, Statutes of California, 1851, adopted in Idaho as Sections 52 and 53 of the Probate Practice Act, p. 335, Idaho Session Laws 1864 (1st Territorial Session). Idaho, just having been created a territory, needed a pattern. The California Code had been in successful operation in California for a period of 12 years, and the conditions in California and Idaho were much the same in pioneer days.

There was also a provision in the code disqualifying married women, Sec. 54, Idaho Session Laws 1864, p. 335, similar to the Utah Statute criticised by appellant, however, this was deleted by the Idaho Legislature by Chapter 174, 1921 Session Laws, p. 369, amending Section 7479 of the Idaho Compiled Laws of 1919.

The California statute was originally taken from the state of New York. I have been unable to trace the origin of this law in New York, however,

it is cited and applied in Coope v. Lowerre, Barbour's Chancery Reports, Vol. I, p. 45 (N.Y. 1845). It appears from McKinney's Consolidated Laws of N.Y. Ann., Bk 58A, Sec. 1001, note at p. 11, that the provision preferring males to females was deleted from the New York statute but the date does not appear.

Much of the Idaho statute law was originally taken from California and the courts of Idaho, particularly in an early day, looked for the construction placed on similar statutes by the California Courts because many of the Idaho statutes were adopted from California and there was a dearth of decisions in Idaho. The Idaho Court considers the decisions of other states persuasive, but, not binding precedents. Oneida County Fair Board v. Smylie, 86 Idaho 341, 386 P.2d 374.

The statutes in controversy were also enacted by Montana in 1877 and were also taken from the California Code. Montana Laws 1877, Sec. 56, p. 253. Montana Statutes 1947, Sec. 91-1401, 91-1402. In re Welscher's Estate 77 M. 164, 250 p. 447 (1926).

The provisions of these statutes specifically preferring males to females have been applied whenever they have come before the courts: Coope v. Lowerre, supra; Wickwire v. Chapman, 15 Barbour 302 N.Y. (1853) Lussen v. Timmerman, 14 N.Y. Surrogate Reports N.Y. (1885) (Demarest 4) p. 250;

In re Wood's Estate, 17 N.Y.S. 354 (1891); In re Coan's Estate (1901) 132 Cal. 401, 64 Pac. 691; In re Welscher's Estate, supra; In re Kern's Estate, 96 M. 443, 31 P.2d 313 (1934); Ed Schaumloeffel v. Mary Schaumloeffel (1946) (Maryland) 46 A2d 692: 164 A.L.R. note p. 859; and the Idaho case which is the subject of this appeal, Reed v. Reed, 93 Idaho 511, 465 P.2d 635. Their constitutionality has never before been questioned.

Probate preference statutes have been followed generally, and held to be mandatory. Vaught v. Struble, 63 Idaho 352, 120 P.2d 259; Skaggs v. Cook (Ky) 374 S.W.2d 857; In re D'Adamo's Estate, 212 N.Y. 214, 106 NE 81, L.R.A. 1915 D. 373; Matter of Campbell's Estate, 192 N.Y. 316, 85 N.E. 392, In re Murphy's Will, 103 N.Y. S.2d 148; Executors and Administrators, 33 C.J.S. Sec. 31, p. 921.

The Idaho Statutes have been on the statute books in Idaho ever since 1864, until acted upon by the recent session of the Idaho Legislature, and no other bill had ever been introduced to repeal or amend these statutes. Long acquiescence in a law and consistent history of state practice requires a strong case to declare it unconstitutional, and this is not such a case. Frank v. Maryland, 359 U.S. 360.

During this long acquiescence, women in Idaho, have had the right to vote on an equal basis with

men ever since 1896, by amendment to Article 6, Section 2 of the Idaho Constitution. Idaho Code Vol. I, p. 150. Idaho women have therefore joined in the common consent to this statute. This Idaho Amendment was authorized by an all male legislature and ratified by an all male electorate.

The Idaho Supreme Court in the decision appealed from considered the question of the constitutionality of the Idaho statute in question under the United States and Idaho Constitution. Appellant has cited Article I, Section I, of the Idaho Constitution. The Idaho Court cited in support of its decision holding the statute constitutional as one authority, Rowe v. City of Pocatello, 70 Idaho 343, 218 P.2d 695. Two other Idaho cases holding that a statute has a presumption of constitutionality are Oneida County Fair Board v. Smylie, supra, and Employment Security Agency v. Joint Class "A" School District, 88 Idaho 384, 400 P.2d 377.

See also Craig v. Lane, 60 Idaho 178, 89 P.2d 1008, and State v. Nadlman, 63 Idaho 153, 118 P.2d 58, which hold that rights guaranteed by the Idaho constitution are those specifically enumerated therein or which existed by common law or statute at the time that document was adopted.

The statute in question was enacted in 1864, the 14th Amendment in 1868. The 14th Amendment was not enacted to prohibit the enactment of laws

making a distinction on the basis of sex. Minor v. Happersett, 21 Wall, 162; Bradwell v. Illinois, 16 Wall, 130; In re Lockwood, 154 U.S. 166. While the question raised in these cases was the claimed abridgment of the privileges and immunities clause of the 14th Amendment, and neither the court or counsel considered the equal protection clause material, the cases, particularly Bradwell v. Illinois, supra, contain a good discussion of what rights were guaranteed by the 14th Amendment, made at a time near the enactment of the Idaho statute in question.

Appellant likens women to slaves and claims they have been discriminated against as though they were an alien race, neither of which arguments are valid. Women are not slaves and they are in a different situation than those of a disadvantaged race in that there is not and has not been the prejudice between men and women of the same race as there has been and very often now is prejudice between the races. Furthermore women in the United States have the same right as men to vote and enact laws, and control their status.

Appellant admits by arguing for a suspect classification for women that the 14th Amendment was not enacted to eliminate laws making a distinction on the basis of sex, and that there is no present legal authority for appellant's contention.

Nothing new can be put into the constitution except by the amendatory process. Ullman v. United States 350 U.S. 422.

The recent amendment proposed to the federal constitution wiping out all laws making any distinction on the basis of sex was defeated after a hearing in the Senate before the Senate Committee. Both sides of the question were fully presented, and the Senate Committee decided against the amendment. These proceedings appear in the "Equal Rights Amendment" hearings on S.J. Res. 61 May 5, 6 and 7, 1970, and Equal Rights 1970 hearings on S.J. Res. 61 and S.J. Res. 231, Sept. 9, 10, 11 and 15, 1970, U.S. Government Printing Office, Washington, 1970.

We agree that a sex amendment to the constitution is not the remedy because of the chaos it would cause in the laws, this is well pointed out in 2 Stanford Law Review, at p. 691, Sex, Discrimination and the Constitution. The same chaos would result by adopting appellant's position in this case.

The remedy or remedies should be with the electorate, by state legislatures, where local conditions and needs are better known and responded to than nationally, and by laws in which women have an equal voice. Professor Willowby Kirtland, Professor of Law, University of Chicago, spoke at the hearing against the proposed sex amendment and agrees with this thought as appears from his statement be-

fore the Senate Committee above referred to on September 19, 1970, at p. 87. See also the statement of James J. White, Professor of Law, University of Michigan at p. 193 following on September 11, 1970.

In the case of Labine v. Vincent, __ U.S. __, 28 L. Ed.2d 288, 91 S. Ct. __, the court at p. 293, L.Ed. states:

"These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules."***

and at page 294 L.Ed.:

"In short, we conclude that in the circumstances presented in this case, there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empower this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana. Affirmed."

The right to inherit property is not a natural right. In re Mahaffay's Estate (Montana) 254 Pac. 875; Descent and Distribution, 23 Am. Jur.2d Sec. 11, p. 758.

The administration of an estate of a decedent is procedural and is incidental to the right to inherit and the descent and distribution of property. Administration is for a temporary period of time, for a specific and temporary purpose and individuals do not rely on it as an employment and means of livelihood. It is procedural and not a substantive right, and this case does not involve due process of law. The administrator is accountable to the court and women equally protected as appears from the opinion of the Probate Court in this case. Appendix p. 8a.

Furthermore there is no probate jurisdiction in the federal courts in the sense that the federal courts probate estates.

States have always legislated with respect to the descent and distribution of property of decedents and with respect to probate procedure within their respective jurisdictions, and these are matters which should be left to the states.

Labine v. Vincent, supra, Markham v. Allen, 326 U.S. 490-496 (1946); O'Callaghan v. O'Brien 199 U.S. 89 (1905); Sutton v. English 246 U.S. 199 (1918); In re Mahaffay's Estate, supra.

In the case of Sutton v. English, the court said at par. (2-5) of its opinion:

"By a series of decisions in this court it has been established that since it does not

pertain to the general jurisdiction of a court of equity to set aside a will or the probate thereof, or to administer upon the estates of decedents in rem, matters of this character are not within the ordinary equity jurisdiction of the federal courts; that as the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of strict probate are not within the jurisdiction of courts of the United States;***"

II.

In considering the second question, we will assume for the purpose of the argument that a substantial Federal question is involved and that it is incumbent upon appellee to justify the statute in question.

The Idaho Probate Practice Act and the Idaho 1st Territorial Session Laws of 1864 do not show from their various provisions that there was any design to consider women inferior to men, to discriminate against women or to "hold them down" as appellant claims. This is evident from these statutes in controversy as women are qualified to act as administrators. Also, see p. 515, Idaho Laws 1864, now Sec. 32-101, Idaho Code, which makes women of lawful age at 18 and men of lawful age at 21 and which construed with Sec. 55 of the 1864 Idaho Session Laws and Idaho Code, Sec. 15-317 providing that an applicant for letters of administration is disqualified unless of lawful age, men;

are disqualified in favor of women from the age 18 to 21. Wickwire v. Chapman, supra, Vaught v. Struble, supra.

The statute in question, Section 15-314 establishes a procedural preference not a disqualification, in that it in effect says, that if both are equally qualified, in other words, if the scales of justice are equally balanced, the court is to prefer the male. Neither does said section prefer the male if he is disqualified.

These probate preference statutes were enacted to provide a guide in Probate Practice. They have been used by the courts of the various states and by the attorneys in the practice to facilitate the probate of estates. They have enabled attorneys to advise clients with reasonable certainty as to the person entitled to be appointed, and thus save the time, trouble and expense of a contest in most cases. They have been and are useful. That another classification might be deemed by the legislature to serve as well appears from recent legislation, though as yet untried.

The legislators in enacting the statute in question knew that men were as a rule more conversant with business affairs than were women. Appellant urges that the activities of women have changed, however, one has but to look around and it is a matter of common knowledge, that women still are not

engaged in politics, the professions, business or industry to the extent that men are. It appears from the appendix to Vol. 2 of the 1971 Idaho Session Laws that there were two women in the Idaho Senate and one in the House of Representatives. The previous legislature, as appears from Idaho Blue Book 1969-1970, with 1968 election returns published by the Secretary of State, for the State of Idaho shows that in the Senate there were two women, one described as a homemaker and one as an attorney, of a membership of 34, and in the House of Representatives three women, an attorney, a registered nurse, and an educator out of a total membership of seventy. This is average.

The Idaho Supreme Court observed there are differences in the sexes created by nature. Much of the criticism of appellant along such lines as classifying women with children and treating them as such may be a misinterpretation of the reasons. We find in all species that nature protects the female and the offspring to propagate the species and not because the female is inferior. The pill and the conception of children in a laboratory and incubation in a test tube, if this occurs, and their rearing in nurseries and children's homes cannot get away from this prime necessity if the race is to be continued, and there will still remain a difference and the necessity for a different treatment.

The statute in question is adequately justified by the well reasoned decision of the Idaho Supreme Court in the decision appealed from and is supported by ample legal authority. Reed v. Reed, supra.

To search history for quotations as to injustices practised by women and men upon each other, and the books and articles by women who are satisfied with being born female would be time consuming and expensive and would serve no useful purpose. It would not demonstrate the thinking of a majority of the women in the United States and would not prove anything. The only way the public sentiment can be satisfactorily gauged is by vote, and women have this right in Idaho on an equal basis as men, and have had this right for seventy-five years.

The briefs of appellant and the amicus curiae contain material which is irrelevant and of more interest to sociologists and legislatures than a court, and more emotional than legal. The gist of appellant's argument is that there "ought to be a law", and if they have briefed the case sufficiently to ascertain the present condition of Idaho Probate Law and the recent indication of the attitude of the Idaho State Legislature as indicated in the 1971 Session Laws they cannot be greatly concerned with this particular case.

This appeal has been taken, briefed and an

appendix ordered and paid for by persons and organizations with no pecuniary interest in the subject matter. The American Civil Liberties Union filed with the Clerk of this Court a bill for \$278.39 for printing the appendix and mailed respondent a copy.

An inventory was not filed in the trial court because the proceedings were stayed by the appeals. It appears from Appendix, p. 2a, paragraph III of the petition of Sally Reed that she estimates the estate at \$745.00. The Credit Union account of \$495.00 was a joint account in the names of the father and son and consisted of the father's earnings, not an asset of the estate, and the other property listed is of doubtful value, and the estate substantially of no value.

The size of the estate does not justify this appeal, and for the purpose of the record respondent objects to the carrying on of the case by those not party to the original record.

For the foregoing legal reasons, respondent respectfully submits that this case should either be dismissed or the judgment of the Supreme Court of the State of Idaho affirmed.

Respectfully submitted,

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 70-4

SALLY M. REED,

Appellant,

—v.—

CECIL R. REED, Administrator, In the Matter of the
Estate of Richard Lynn Reed, Deceased.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IDAHO

REPLY BRIEF FOR APPELLANT

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ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF IDAHO

REPLY BRIEF FOR APPELLANT

Idaho Code, Sec. 15-314, the statute at issue in this case, remains effective until July 1, 1972. On that date a new Probate Code will become effective which does not include the challenged provision. C. 111 of the Idaho Session Laws of 1971, Vol. I, pp. 233-382. On the misguided assumption that the prospective change affects this Court's jurisdiction, appellee requests dismissal of the appeal for failure to present a substantial federal question.

Appellee does not dispute that the sec. 15-314 command, "males must be preferred to females," remains applicable to the parties in this litigation. Indeed, the effective date of the new Probate Code places beyond question the application of the male preference directive to the dispute between the parties in this case. Thus the

prospective change does not alter appellant's right, pursuant to 28 U.S.C. §1257(2), to adjudication by this Court. *Campbell v. California*, 200 U.S. 87, 91-93 (1906); see John M. Harlan, Manning the Dikes, 13 Record of the Bar of the New York City Bar Association 541, 546 (1958). Absent this Court's review, the appellant, solely on the ground of her sex, will be denied an opportunity to be heard on her application to be appointed fiduciary of an estate she is "equally entitled to administer."

With respect to the parties before the Court, the issue raised by appellant is as vital now as it was at the inception of this controversy. The federal question presented is at least as substantial as any this Court has heard: the constitutional right of a person, who is a woman, to be judged on the basis of her individual qualifications, rather than pre-judged by a male legislature's assignment of second rank status to all members of the female sex.

Significantly, a similar male preference law of the District of Columbia was eliminated by Congress on August 11, 1971. Public Law 92-88 (H.R. 7931, 92d Cong., 1st Sess.). This congressional action was prompted by awakened consciousness that preferential treatment of males over females is "outmoded and discriminatory." H.R. Rep. No. 92-178, 92d Cong., 1st Sess. 1, 3, 6 (1971).

Section 15-314 of the Idaho Code, and myriad statutes cast in the same mold still flourishing across the country, have survived into the 1970's because this Court has not yet settled the question whether the basic law of our land establishes the principle of equality before the law without regard to sex.

The myth that women are inherently disqualified for full participation in public life as independent persons is

no longer acceptable. Yet this Court's silence has deferred recognition by the law that women are full persons, entitled as men are to due process guarantees and the equal protection of the laws. The time to break the vicious cycle which sex discriminatory laws create is overdue. If a legislature can bar a woman from service as a fiduciary on the basis of once popular, but never proved, assumptions that women are less qualified than men are to perform such services, then the myth becomes insulated from attack, because the law deprives women of the opportunity to prove it false. Cf. *Carrington v. Rash*, 380 U.S. 89, 93, 96 (1965).

Sally Reed awaits a day in Court on her application to be appointed administrator; ~~all~~ women await this Court's affirmation that the Constitution guarantees to them, together with men, equal justice under the law.*

Respectfully submitted,

RUTH BADER GINSBURG

MELVIN L. WULF

ALLEN R. DERR

PAULI MURRAY

DOROTHY KENYON

Attorneys for Appellant

* See President's Commission on the Status of Women, *American Women 44* (1963):

Equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land. The Commission believes that this principle of equality is embodied in the 5th and 14th amendments to the Constitution of the United States.

The Commission regarded as "imperative" "early and definitive court pronouncement, particularly by the U. S. Supreme Court" "to the end that the principle of equality become firmly established in constitutional doctrine." *Id.* at 45.

Opinion of the Court

REED v. REED, ADMINISTRATOR

APPEAL FROM THE SUPREME COURT OF IDAHO

No. 70-4. Argued October 19, 1971—Decided November 22, 1971

A mandatory provision of the Idaho probate code that gives preference to men over women when persons of the same entitlement class apply for appointment as administrator of a decedent's estate is based solely on a discrimination prohibited by and therefore violative of the Equal Protection Clause of the Fourteenth Amendment.

Idaho 511, 465 P. 2d 635, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Allen R. Derr argued the cause for appellant. With him on the briefs were Melvin L. Wulf, Ruth Bader Ginsburg, Pauli Murray, and Dorothy Kenyon.

Charles S. Stout argued the cause for appellee. With him on the brief was Myron E. Anderson.

Briefs of *amici curiae* urging reversal were filed by J. Lee Rankin and Norman Redlich for the City of New York; by Martha W. Griffiths, Leo Kanowitz, Sylvia Roberts, Phineas Indritz, Marguerite Rawalt, and Faith Seidenberg for the Legal Defense and Education Fund, Inc.; and by Birch Bayh for the National Federation of Business and Professional Women's Clubs, Inc.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Richard Lynn Reed, a minor, died intestate in Ada County, Idaho, on March 29, 1967. His adoptive parents, who had separated sometime prior to his death, are the parties to this appeal. Approximately seven months after Richard's death, his mother, appellant Sally Reed, filed a petition in the Probate Court of Ada County,

seeking appointment as administratrix of her son's estate.¹ Prior to the date set for a hearing on the mother's petition, appellee Cecil Reed, the father of the decedent, filed a competing petition seeking to have himself appointed administrator of the son's estate. The probate court held a joint hearing on the two petitions and thereafter ordered that letters of administration be issued to appellee Cecil Reed upon his taking the oath and filing the bond required by law. The court treated §§ 15-312 and 15-314 of the Idaho Code as the controlling statutes and read those sections as compelling a preference for Cecil Reed because he was a male.

Section 15-312² designates the persons who are entitled to administer the estate of one who dies intestate. In making these designations, that section lists 11 classes of persons who are so entitled and provides, in substance,

¹ In her petition, Sally Reed alleged that her son's estate, consisting of a few items of personal property and a small savings account, had an aggregate value of less than \$1,000.

² Section 15-312 provides as follows:

"Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned, and they are respectively entitled thereto in the following order:

"1. The surviving husband or wife or some competent person whom he or she may request to have appointed.

"2. The children.

"3. The father or mother.

"4. The brothers.

"5. The sisters.

"6. The grandchildren.

"7. The next of kin entitled to share in the distribution of the estate.

"8. Any of the kindred.

"9. The public administrator.

"10. The creditors of such person at the time of death.

"11. Any person legally competent.

"If the decedent was a member of a partnership at the time of his decease, the surviving partner must in no case be appointed administrator of his estate."

that the order in which those classes are listed in the section shall be determinative of the relative rights of competing applicants for letters of administration. One of the 11 classes so enumerated is "[t]he father or mother" of the person dying intestate. Under this section, then, appellant and appellee, being members of the same entitlement class, would seem to have been equally entitled to administer their son's estate. Section 15-314 provides, however, that

"[o]f several persons claiming and equally entitled [under § 15-312] to administer, males must be preferred to females, and relatives of the whole to those of the half blood."

4. In issuing its order, the probate court implicitly recognized the equality of entitlement of the two applicants under § 15-312 and noted that neither of the applicants was under any legal disability; the court ruled, however, that appellee, being a male, was to be preferred to the female appellant "by reason of Section 15-314 of the Idaho Code." In stating this conclusion, the probate judge gave no indication that he had attempted to determine the relative capabilities of the competing applicants to perform the functions incident to the administration of an estate. It seems clear the probate judge considered himself bound by statute to give preference to the male candidate over the female, each being otherwise "equally entitled."

Sally Reed appealed from the probate court order, and her appeal was treated by the District Court of the Fourth Judicial District of Idaho as a constitutional attack on § 15-314. In dealing with the attack, that court held that the challenged section violated the Equal Protection Clause of the Fourteenth Amendment³ and was, there-

³ The court also held that the statute violated Art. I, § 1, of the Idaho Constitution.

fore, void; the matter was ordered "returned to the Probate Court for its determination of which of the two parties" was better qualified to administer the estate.

This order was never carried out, however, for Cecil Reed took a further appeal to the Idaho Supreme Court, which reversed the District Court and reinstated the original order naming the father administrator of the estate. In reaching this result, the Idaho Supreme Court first dealt with the governing statutory law and held that under § 15-312 "a father and mother are 'equally entitled' to letters of administration," but the preference given to males by § 15-314 is "mandatory" and leaves no room for the exercise of a probate court's discretion in the appointment of administrators. Having thus definitively and authoritatively interpreted the statutory provisions involved, the Idaho Supreme Court then proceeded to examine, and reject, Sally Reed's contention that § 15-314 violates the Equal Protection Clause by giving a mandatory preference to males over females, without regard to their individual qualifications as potential estate administrators. 93 Idaho 511, 465 P. 2d 635.

Sally Reed thereupon appealed for review by this Court pursuant to 28 U. S. C. § 1257 (2), and we noted probable jurisdiction. 401 U. S. 934. Having examined the record and considered the briefs and oral arguments of the parties, we have concluded that the arbitrary preference established in favor of males by § 15-314 of the Idaho Code cannot stand in the face of the Fourteenth Amendment's command that no State deny the equal protection of the laws to any person within its jurisdiction.⁴

⁴ We note that § 15-312, set out in n. 2, *supra*, appears to give a superior entitlement to brothers of an intestate (class 4) than is given to sisters (class 5). The parties now before the Court are not

Opinion of the Court

Idaho does not, of course, deny letters of administration to women altogether. Indeed, under § 15-312, a woman whose spouse dies intestate has a preference over a son, father, brother, or any other male relative of the decedent. Moreover, we can judicially notice that in this country, presumably due to the greater longevity of women, a large proportion of estates, both intestate and under wills of decedents, are administered by surviving widows.

Section 15-314 is restricted in its operation to those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class established by § 15-312. In such situations, § 15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly*, 113 U. S. 27 (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61 (1911); *Railway Express Agency v. New York*, 336 U. S. 106 (1949); *McDonald v. Board of Election Commissioners*, 394 U. S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into

affected by the operation of § 15-312 in this respect, however, and appellant has made no challenge to that section.

We further note that on March 12, 1971, the Idaho Legislature adopted the Uniform Probate Code, effective July 1, 1972. Idaho Laws 1971, c. 111, p. 233. On that date, §§ 15-312 and 15-314 of the present code will, then, be effectively repealed, and there is in the new legislation no mandatory preference for males over females as administrators of estates.

different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.

In upholding the latter section, the Idaho Supreme Court concluded that its objective was to eliminate one area of controversy when two or more persons, equally entitled under § 15-312, seek letters of administration and thereby present the probate court "with the issue of which one should be named." The court also concluded that where such persons are not of the same sex, the elimination of females from consideration "is neither an illogical nor arbitrary method devised by the legislature to resolve an issue that would otherwise require a hearing as to the relative merits . . . of the two or more petitioning relatives" 93 Idaho, at 514, 465 P. 2d, at 638.

Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy. The crucial question, however, is whether § 15-314 advances that objective in a manner consistent with the command of the Equal Protection Clause. We hold that it does not. To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be

said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.

We note finally that if § 15-314 is viewed merely as a modifying appendage to § 15-312 and as aimed at the same objective, its constitutionality is not thereby saved. The objective of § 15-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. *Royster Guano Co. v. Virginia*, *supra*.

The judgment of the Idaho Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.